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Supreme Court of the United States

OCTOBER TERM, 1954

No. 375

VIRGIL G. CARROLL, HARRY B. HOGAN, DOING BUSINESS AS HARRY B. HOGAN PAINTING COMPANY, AND SAINT PAUL-MERCURY INDEMNITY COMPANY, PETITIONERS,

vs.

M. LANZA, DOING BUSINESS AS LAKE CHARLES ELECTRIC COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 28, 1954

CERTIORARI GRANTED NOVEMBER 8, 1954

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 15,016
CIVIL.

M. LANZA, DOING BUSINESS AS LAKE CHARLES ELECTRIC COMPANY, APPELLANT,

vs.

VIRGIL G. CARROLL AND HARRY B. HOGAN, DOING BUSINESS AS HARRY B. HOGAN PAINTING COMPANY, AND SAINT PAUL-MERCURY INDEMNITY COMPANY, APPELLEES.

No. 15,017
CIVIL.

M. LANZA, DOING BUSINESS AS LAKE CHARLES ELECTRIC COMPANY, APPELLANT,

vs.

PAUL A. JENNINGS, A MINOR, BY O. E. JENNINGS, HIS NEXT FRIEND, AND HARRY B. HOGAN, DOING BUSINESS AS HARRY B. HOGAN PAINTING COMPANY, AND SAINT PAUL-MERCURY INDEMNITY COMPANY, APPELLEES.

No. 15,018
CIVIL.

M. LANZA, DOING BUSINESS AS LAKE CHARLES ELECTRIC COMPANY, APPELLANT,

vs.

SAINT PAUL-MERCURY INDEMNITY COMPANY, HARRY B. HOGAN, DOING BUSINESS AS HARRY B. HOGAN PAINTING COMPANY, AND LONNIE SISNEY, APPELLEES.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS

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[fol. 2] (Petition for Removal in Carroll Case, Civil No. 352)

(Filed in U. S. District Court on March 20, 1953)

In the United States District Court, Western District of Arkansas, Harrison Division.

Virgil G. Carroll, Plaintiff,

352. vs.

M. Lanza d/b/a Lake Charles Electric Company, Defendant.

1. Defendant states that the cause of action alleged by the plaintiff is of a civil nature at law of which the District Courts of the United States have jurisdiction; that it involves more than Three Thousand and No./100 Dollars ($3,000.00), exclusive of interest, penalties and costs; that at the time of the commencement of this suit and at the present time, the plaintiff was, and is, a citizen and resident of Missouri, and the defendant was, and is, a citizen and resident of Louisiana.

2. Presented herewith is a copy of all process, pleadings and orders served upon the defendant in this action in the Circuit Court of Baxter County, Arkansas, a complaint, a summons which was served on C. G. Hall, Secretary of State for the State of Arkansas, on March 5, 1953, and a notice dated March 6, 1953.

3. Also presented herewith is bond with good and sufficient surety, conditioned that the defendant will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

Wherefore, M. Lanza, d/b/a Lake Charles Electric Company petitions for removal of the said action to the United States District Court, Western District of Arkansas, Harrison Division.

WRIGHT, HARRISON, LINDSEY & UPTON,
1025 Pyramid Building,
Little Rock, Arkansas.
By Alston Jennings,
Attorneys for Defendant.

[fol. 3] Affidavit.

State of Arkansas,
County of Pulaski—ss.:

Alston Jennings, being duly sworn, states that he is one of the attorneys for the defendant and that the facts alleged in the foregoing petition for removal are true.

ALSTON JENNINGS.

Subscribed and sworn to before me this.....day of March, 1953.

.....
Notary Public.

My Commission Expires:

.....

[fol. 4] (Certificate of Service, etc., of Petition for Removal in Carroll Case, Civil No. 352)

(Filed in U. S. District Court on March 20, 1953)

I, Alston Jennings, 1025 Pyramid Building, Little Rock, Arkansas, one of the attorneys for the defendant, certify that a copy of the petition for removal was filed with the Circuit Clerk of Baxter County, Arkansas, by air mailing such copy to said clerk on March 19, 1953, and that on March 19, 1953, I notified Allen, Woolsey & Fisher, attorneys for the plaintiff, of the filing of the petition for removal herein, furnishing them with a copy of the petition for removal and with a copy of this certificate by mailing

the same to them by registered mail, return receipt requested at their office in the Woodruff Building, Springfield, Missouri.

Dated this the 19th day of March, 1953.

ALSTON JENNINGS,

[fol. 5] (Petition for Removal in Jennings Case, Civil No. 353)

(Filed in U. S. District Court on March 20, 1953)

In the United States District Court, Western District of Arkansas, Harrison Division.

Paul A. Jennings, a Minor, by O. E. Jennings, his Next Friend, Plaintiff,

353. vs.

M. Lanza, d/b/a Lake Charles Electric Company, Defendant.

1. Defendant states that the cause of action alleged by the plaintiff is of a civil nature at law of which the District Courts of the United States have jurisdiction; that it involves more than Three Thousand and No/100 Dollars ($3,000.00), exclusive of interest, penalties and costs; that at the time of the commencement of this suit and at the present time, the plaintiff was, and is, a citizen and resident of Arkansas, and the defendant was, and is, a citizen and resident of Louisiana.

2. Presented herewith is a copy of all process, pleadings and orders served upon the defendant in this action in the Circuit Court of Baxter County, Arkansas, being a designation of next friend, a complaint, a summons which was served on C. G. Hall, Secretary of State for the State of Arkansas, on March 5, 1953, and a notice dated March 6, 1953.

3. Also presented herewith is bond with good and sufficient surety, conditioned that the defendant will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the cause was not removable or was improperly removed.

WHEREFORE, M. Lanza, d/b/a Lake Charles Electric Company petitions for removal of the said action to the United States District Court, Western District of Arkansas, Harrison Division.

WRIGHT, HARRISON,
LINDSEY & UPTON,
1025 Pyramid Building,
Little Rock, Arkansas.

By ALSTON JENNINGS,
Attorneys for Defendant.

[fol. 6] Affidavit

State of Arkansas
County of Pulaski—ss.:

Alston Jennings, being duly sworn, states that he is one of the attorneys for the defendant and that the facts alleged in the foregoing petition for removal are true.

ALSTON JENNINGS.

Subscribed and sworn to before me this .... day of March, 1953.

....,
Notary Public.

My Commission Expires:
.....

[fol. 7] (Certificate of Service, etc., of Petition for Removal in Jennings Case, Civil No. 353)

(Filed in U. S. District Court on March 20, 1953)

I, Alston Jennings, 1025 Pyramid Building, Little Rock, Arkansas, one of the attorneys for the defendant, certify that a copy of the petition for removal was filed with the Circuit Clerk of Baxter County, Arkansas, by mailing such copy to said clerk on March 19, 1953, and that on March 19, 1953, I notified Allen, Woolsey & Fisher, attorneys for the plaintiff, of the filing of the petition for removal herein, furnishing them with a copy of the petition for removal and with a copy of this certificate by mailing the same to

them by registered mail, return receipt requested at their office in the Woodruff Building, Springfield, Missouri.

Dated this the 19th day of March, 1953.

ALSTON JENNINGS.

[fol. 8] (Petition for Damages (Complaint) in Carroll Case, Civil No. 352)

(Filed in U. S. District Court on March 2, 1953)

In the Circuit Court of Baxter County, Arkansas

Virgil G. Carroll, Plaintiff,

vs.

M. Lanza, d/b/a Lake Charles Electric Company,

Defendant.

Comes now the plaintiff, Virgil G. Carroll, and for his cause of action against this defendant states, alleges and avers to the Court as follows:

1. That the plaintiff is a resident of Springfield, Greene County, Missouri, and that this defendant is a resident of Lake Charles, Louisiana, and plaintiff further states that his cause of action occurred in Baxter County, Arkansas at the Bull Shoals dam site where this defendant has and at all times mentioned herein had and maintained an office in connection with its operations in regard to the construction of the Bull Shoals Dam, said operations being in conformance with a contract entered into between this defendant and the U. S. Government; and plaintiff further states that as this defendant is a non-resident of the State of Arkansas who has and is now doing business and performing work in the State of Arkansas, and that this cause of action accrued from the doing of such business or the performance of such work, that this plaintiff requests that service of process be made upon this defendant by serving a copy of the process upon the Secretary of State of the State of Arkansas; and this plaintiff further states that notice of such service and a copy of the process will forthwith be sent by registered mail by the Attorney representing

this plaintiff to the defendant at Lake Charles, Louisiana, the above being in compliance with Section 27-340, Arkansas Statutes, 1947, Annotated.

2. That on the 26th day of January, 1953, the plaintiff was an employee of Harry B. Hogan, doing business as Harry B. Hogan Painting Company of Springfield, Missouri, which company had entered into a subcontract [fol. 9] with this defendant for the painting of certain "trash racks" which were to be installed by this defendant and made a part of Bull Shoals Dam, and that while this plaintiff was engaged in the painting of said "trash racks" this plaintiff received serious and permanent injuries which were caused directly and proximately by the negligence of agents, servants, or employees of this defendant acting within the scope of their employment at said time and place.

3. That it was the duty of this defendant under the terms of the agreement between this defendant and the Harry B. Hogan Painting Company to place said "trash racks" in an upright position, arranged so as to be accessible for painting and in such a manner that this plaintiff and other employees of the Harry B. Hogan Painting Company would not be required to move, re-arrange, or do anything to said "trash racks" besides clean and paint; said "trash racks" to be under the exclusive care, custody and control of this defendant and his agents, servants or employees; that while this plaintiff and two other employees of the Harry B. Hogan Painting Company were engaged in painting some of the said "trash racks" that said "trash racks" were caused to fall and injure this plaintiff; that this plaintiff does not know the cause of said "trash racks" falling but that this defendant, who was in sole custody, control and supervision of the placing of and moving (if necessary) of said "trash racks" had superior knowledge to this plaintiff as to the cause of plaintiff's injuries, which resulted from the falling of said "trash racks", and plaintiff further states that said injuries would not have been received by this plaintiff but for the carelessness and negligence in the placing of or in the moving of said "trash racks" by this defendant, his agents, servants or employees.

4. That as a direct and proximate result of the negligence set out above this plaintiff suffered serious, painful and permanent injuries as follows, to-wit: severe bruises, abrasions and contusions about the left forearm, the left hand, the right hip, and about many other places on this plaintiff's body; that he received a severe bruising injury to the back and right shoulder, causing pain and tenderness of the back and right shoulder; that he received a comminuted fracture of the radius and ulna bones of the [fol. 10] left forearm resulting in marked deformity of the left forearm, all resulting in serious and permanent injury to the muscles, nerves and tissues of the arm and body of this plaintiff, said injuries being serious and permanent in nature, resulting in his being totally disabled as of this time and which injuries will disable him for some time in the future. As a further result of said disability the plaintiff has suffered a loss of income and will continue to suffer a loss of income as a result of the permanent disabling injuries suffered to the left forearm of this plaintiff, which injury will prevent the plaintiff from resuming his normal and regular occupation as a painter. In addition thereto this plaintiff has been caused to expend large sums for hospital and medical care and will be caused to expend sums for medical care in the future, all resulting in damages to this plaintiff in the sum of Fifty Thousand ($50,000.00) Dollars.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of Fifty Thousand ($50,000.00) Dollars, together with his costs expended herein.

ALLEN, WOOLSEY & FISHER,
By HAROLD J. FISHER,
Attorneys for Plaintiff.

Allen, Woolsey & Fisher,
Attorneys at Law,
905 Woodruff Building,
Springfield, Missouri.

[fol. 11] (Petition for Damages (Complaint) in Jennings Case, Civil No. 353)

(Filed in U. S. District Court on March 2, 1953)

In The Circuit Court of Baxter County, Arkansas.

Paul A. Jennings, a Minor, by O. E. Jennings, his Next Friend, Plaintiff,

vs.

M. Lanza, d/b/a Lake Charles Electric Company, Defendant.

Comes now the plaintiff, Paul A. Jennings, by his next friend, and for his cause of action against this defendant states, alleges and avers to the Court as follows:

1. That the plaintiff, Paul A. Jennings, and his next friend, O. E. Jennings, are residents of Mountain Home, Baxter County, Arkansas, and that this defendant is a resident of Lake Charles, Louisiana, and plaintiff, Paul A. Jennings, further states that his cause of action occurred in Baxter County, Arkansas at the Bull Shoals dam site where this defendant has and at all times mentioned herein had and maintained an office in connection with its operations in regard to the construction of the Bull Shoals Dam, said operations being in conformance with a contract entered into between this defendant and the U. S. Government; and plaintiff further states that as this defendant is a non-resident of the State of Arkansas who has and is now doing business and performing work in the State of Arkansas, and that this cause of action accrued from the doing of such business or the performance of such work, that this plaintiff, Paul A. Jennings, requests that service of process be made upon this defendant by serving a copy of the process upon the Secretary of State of the State of Arkansas; and this plaintiff, Paul A. Jennings, further states that notice of such service and a copy of the process will forthwith be sent by registered mail by the Attorney representing this plaintiff to the defendant at Lake Charles, Louisiana, the above being in compliance with Section 27-340, Arkansas Statutes, 1947, Annotated.

[fol. 12] 2. That on the 26th day of January, 1953, this plaintiff, Paul A. Jennings, was an employee of Harry B.

Hogan, doing business as Harry B. Hogan Painting Company of Springfield, Missouri, which company had entered into a subcontract with this defendant for the painting of certain "trash racks" which were to be installed by this defendant and made a part of Bull Shoals Dam, and that while this plaintiff, Paul A. Jennings, was engaged in the painting of said "trash racks" this plaintiff, Paul A. Jennings, received serious and permanent injuries which were caused directly and proximately by the negligence of agents, servants, or employees of this defendant acting within the scope of their employment at said time and place.

3. That it was the duty of this defendant under the terms of the agreement between this defendant and the Harry B. Hogan Painting Company to place said "trash racks" in an upright position, arranged so as to be accessible for painting and in such a manner that this plaintiff, Paul A. Jennings, and other employees of the Harry B. Hogan Painting Company would not be required to move, re-arrange, or do anything to said "trash racks" besides clean and paint; said "trash racks" to be under the exclusive care, custody and control of this defendant and his agents, servants or employees; that while this plaintiff, Paul A. Jennings, and two other employees of the Harry B. Hogan Painting Company were engaged in painting some of the said "trash racks" that said "trash racks" were caused to fall and injure this plaintiff; that this plaintiff does not know the cause of said "trash racks" falling but that this defendant, who was in sole custody, control and supervision of the placing of and moving (if necessary) of said "trash racks" had superior knowledge to this plaintiff, Paul A. Jennings, as to the cause of plaintiff's injuries, which resulted from the falling of said "trash racks," and plaintiff further states that said injuries would not have been received by this plaintiff, Paul A. Jennings, but for the carelessness and negligence in the placing of or in the moving of said "trash racks" by this defendant, his agents, servants or employees.

4. That as a direct and proximate result of the negligence set out above this plaintiff, Paul A. Jennings, suffered serious, plainful and permanent injuries as follows, to-

[fol. 13] wit: severe bruises, contusions and abrasions of the back and chest, causing serious and permanent injuries to the muscles, nerves and tissues thereof; that he suffered a fracture of the right pubic ramis, in addition to bruises and contusions of the whole body, all of which have caused serious and permanent injuries to this plaintiff, resulting in his being totally disabled at this time and which injuries will disable this plaintiff for some time in the future. As a further result of said disabilities the plaintiff has suffered a loss of income, and will in the future suffer a loss of income, and in addition thereto, this plaintiff has been caused to expend large sums for hospital and medical care, and will be caused to expend sums for medical care in the future, all resulting in damages to this plaintiff in the sum of Twenty-five Thousand ($25,000.00) Dollars.

Wherefore, plaintiff prays judgment against the defendant for the sum of Twenty-five Thousand ($25,000.00) Dollars, together with his costs expended herein.

ALLEN, WOOLSEY & FISHER

By Harold J. Fisher,
Attorneys for Plaintiff.

Allen, Woolsey & Fisher
Attorneys at Law
905 Woodruff Building
Springfield, Missouri

[fol. 14] (Designation of O. E. Jennings as Next Friend of Paul A. Jennings, a Minor, in Jennings Case, Civil No. 353)

(Filed in U. S. District Court on March 2, 1953)

In The Circuit Court of Baxter County, Arkansas.

Paul A. Jennings, a Minor, by O. E. Jennings, his Next Friend, Plaintiff,

vs.

M. Lanza, d/b/a Lake Charles Electric Company, Defendant.

Comes now your petitioner, Paul A. Jennings, and respectfully reports to the Court that he is a minor 19 years

of age; that he resides at Mountain Home, Baxter County, Arkansas, and is desirous of instituting a suit in this Court against M. Lanza, doing business as Lake Charles Electric Company, to recover damages for personal injuries sustained; that he verily believes that said injuries were caused by the negligence of this defendant and that he believes he has a good cause of action for the injuries he sustained.

Your petitioner requests that his father, O. E. Jennings, be appointed Next Friend for the purpose of instituting this suit, and that his father, O. E. Jennings, is his natural guardian and parent and resides at Mountain Home, Baxter County, Arkansas.

Wherefore your petitioner prays the Court to appoint his father, O. E. Jennings, as Next Friend for the purpose of instituting and prosecuting said suit.

PAUL A. JENNINGS,
Petitioner.

I, O. E. Jennings, father of the petitioner, Paul A. Jennings, state that I reside in Mountain Home, Baxter County, Arkansas, and I consent to serve as Next Friend of Paul A. Jennings for the purpose of instituting and prosecuting said suit against M. Lanza, doing business as Lake Charles Electric Company, and I agree to be responsible therefor in all respects and purposes.

O. E. JENNINGS,
Next Friend.

State of Arkansas,
County of Baxter.—ss.:

[fol. 15] On this 2nd day of March, 1953, before me, a Notary Public within and for Baxter County, State of Arkansas, appeared O. E. Jennings and acknowledged the execution of the above written instrument to serve as Next

Friend of Paul A. Jennings a minor, in a suit against M. Lanza, d/b/a Lake Charles Electric Company, said suit to be instituted and prosecuted in the above named Court.

My Commission expires 2-27-54.

ERNIE WRIGHT,
Notary Public.

[fol. 16] (Complaint in Saint Paul-Mercury Indemnity Company Case, Civil No. 356)

(Filed in U. S. District Court on June 13, 1953)

District Court of the United States for the Harrison Division of the Western District of Arkansas.

Saint Paul-Mercury Indemnity Company, Harry B. Hogan, doing business as Harry B. Hogan Painting Company, and Lonnie Sisney, Plaintiffs,

No. 356. vs.

M. Lanza, doing business as Lake Charles Electric Company, Defendant.

I.

At all times mentioned herein, plaintiff, Lonnie Sisney, a citizen of Arkansas, was an employee of the plaintiff, Harry B. Hogan, a citizen of Missouri, doing business as Harry B. Hogan Painting Company, Saint Paul-Mercury Indemnity Company, the other plaintiff, a corporation organized and existing under the laws of the State of Delaware, was the insurance company carrying workmen's compensation insurance on Harry B. Hogan, doing business as Harry B. Hogan Painting Company. The defendant, M. Lanza, is a citizen of Louisiana, doing business as Lake Charles Electriet Company. The cause of action sued on herein occurred at the Bull Shoals dam site in Baxter County, Arkansas, where defendant maintains and has at all times mentioned herein maintained an office in connection with its operations in the construction of Bull Shoals Dam, said operations being in conformance with a contract entered into between the defendant and the United States. The amount involved herein exceeds the sum of $3,000.00, exclusive of interest and costs.

II.

Prior to January 26, 1953, the plaintiff, Harry B. Hogan, doing business as Harry B. Hogan Painting Company, had entered into a subcontract with defendant for the painting of certain "trash racks" which were to be installed by defendant and made a part of Bull Shoals Dam. On January 26, 1953, while plaintiff, Lonnie Sisney, was engaged in the painting of said trash racks, he received painful, serious and permanent injuries hereinafter described, which [fol. 17] injuries arose out of and in the course of his employment by the plaintiff, Harry B. Hogan, doing business as Harry B. Hogan Painting Company, and were caused, directly and proximately, by the defendant, its agents, servants and employees, all of whom were acting within the scope of their employment.

III.

Under the terms of the agreement between defendant and plaintiff, Harry B. Hogan, doing business as Harry B. Hogan Painting Company, it was the duty of defendant to place the trash racks, upon which plaintiff, Lonnie Sisney, was working when he was injured, in an up-right position, arranged so as to be accessible for painting and in such a manner that he and other employees of the said Harry B. Hogan, doing business as Harry B. Hogan Painting Company, would not be required to move or re-arrange them or do anything to them except clean and paint them. Also, under the terms of said contract, said trash racks were under the exclusive care, custody and control of defendant, its agents, servants and employees. While plaintiff, Lonnie Sisney, and two other employees of the said Harry B. Hogan, doing business as Harry B. Hogan Painting Company, were engaged in painting some of said trash racks, said trash racks fell upon and injured plaintiff, Lonnie Sisney, the falling of said trash racks having been caused solely by the carelessness and negligence of the defendant, its agents, servants and employees, in failing to furnish said plaintiff a safe place in which to work and in negligently moving said trash racks and in removing the supports upon which they rested.

IV.

The painful, serious and permanent injuries thus sustained by plaintiff, Lonnie Sisney as the direct and proximate result of the carelessness and negligence of the defendant are as follows: Fracture of the anterior and posterior ramis of both pubic bones; fracture of the sacrum; rupture of the bladder; laceration of the chin and severe bruises, contusions and abrasions on various parts of the body, all of which resulted in the plaintiff, Lonnie Sisney, being totally disabled at this time and for some time in the future and which will result in permanent disability of the said plaintiff. As a further result of said injuries and disabilities, besides the physical pain, suffering and discom-[fol. 18] fort, the plaintiff, Lonnie Sisney, has suffered a loss of income and will in the future suffer additional loss of income.

V.

Promptly upon the report to them of the injuries sustained by plaintiff, Lonnie Sisney, as aforesaid, plaintiffs, Saint Paul-Mercury Indemnity Company and Harry B. Hogan, doing business as Harry B. Hogan Painting Company, recognized their liability to him under the terms of the Arkansas Workmen's Compensation Act, and have from time to time made payments to him and on his behalf under said act, and will continue to make appropriate payments under said act. Plaintiff, Lonnie Sisney, has not brought an action in tort against the defendant herein pursuant to Section 40(a) of Initiated Act 4, adopted by the people of Arkansas November 2, 1948. Plaintiffs bring this action in tort against the defendant pursuant to Section 40(b) of said Act 4.

Wherefore plaintiffs, Saint Paul-Mercury Indemnity Company, Harry B. Hogan, doing business as Harry B. Hogan Painting Company, and Lonnie Sisney, pray judgment against the defendant for the sum of $75,000.00, said judgment to include an order distributing the amount thereof to the plaintiffs pursuant to Section 40(b) of Initiated Act No. 4, as their respective interests may appear.

GOODWIN & RIFFEL,
Attorneys for Plaintiffs.

[fol. 19] (Answer in Carroll Case, Civil No. 352)

(Filed in U. S. District Court on March 26, 1953)

In the United States District Court, Western District of Arkansas, Harrison Division, Plaintiff,

Virgil G. Carroll, Plaintiff,
No. 352. vs. Civil.
M. Lanza, d/b/a Lake Charles Electric Company, Defendant.

Defendant, for answer to the complaint of the plaintiff, states:

1. Defendant admits the allegations contained in Paragraph 1 of the complaint.

2. Defendant admits that the plaintiff was an employee of Harry B. Logan and admits that plaintiff was engaged in the painting of certain "trash racks". Defendant admits that plaintiff was injured, but defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation as to the nature and extent of such injuries and, therefore, denies that the injuries to the plaintiff were serious and permanent. Defendant denies that injuries to the plaintiff were caused by negligence of agents, servants, or employees of the defendant.

3. Defendant denies all of the allegations of Paragraph 3 of the complaint; denies that the "trash racks" were under the exclusive care, custody and control of the defendant and his agents, servants or employees; denies that defendant had superior knowledge to the plaintiff as to the cause of the plaintiff's injuries; and denies that the said "trash racks" were caused to fall by any negligence or carelessness on the part of the defendant, his agents, servants, or employees.

4. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations [fol. 20] as to the nature and extent of injuries suffered by plaintiff and, therefore, denies the allegations set out in Paragraph 4 of the complaint.

5. Defendant further states that certain braces or supports had been placed by the defendant upon and about the

said "trash racks" for the purpose of supporting and holding the said "trash racks" and that prior to the time when the said "trash racks" fell certain of the said braces or supports had been removed by some person unknown to the defendant and without the defendant's knowledge. Defendant states that the plaintiff either removed, or knew or ought to have known that some other person had removed, the braces or supports referred to and that the plaintiff was negligent and careless in failing to advise the defendant, or his agents, servants, or employees that the said supports or braces had been removed and in continuing to work upon the said "trash racks" when he had knowledge that the said braces or supports had been removed.

6. Defendant further states that the plaintiff voluntarily assumed the risk of the "trash racks" falling by working upon and about the said "trash racks" at the time and place complained of with full knowledge of the circumstances then existing.

Wherefore, defendant prays the Court that the complaint of the plaintiff be dismissed, for his costs and all other proper relief.

WRIGHT, HARRISON, LINDSEY & UPTON,
1025 Pyramid Building,
Little Rock, Arkansas.
By Alston Jennings,
Attorneys for Defendant.

[fol. 21] (Proof of Service omitted in printing)

[fol. 22] (Answer in Jennings Case, Civil No. 353)

(Filed in U. S. District Court on March 26, 1953)

In the United States District Court
Western District of Arkansas, Harrison Division

Paul A. Jennings, a minor, by O. E. Jennings, his Next Friend, Plaintiff,

No. 353 vs. Civil

M. Lanza, d/b/a Lake Charles Electric Company, Defendant.

Defendant, for answer to the complaint of Paul A. Jennings, states:

1. Defendant admits the allegations contained in Paragraph 1 of the complaint.

2. Defendant admits that Paul A. Jennings was an employee of Harry B. Hogan and admits that Paul A. Jennings was engaged in the painting of certain "trash racks". Defendant admits that Paul A. Jennings was injured, but defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation as to the nature and extent of such injuries and, therefore, denies that the injuries to Paul A. Jennings were serious and permanent. Defendant denies that injuries to Paul A. Jennings were caused by negligence of agents, servants, or employees of the defendant.

3. Defendant denies all of the allegations of Paragraph 3 of the complaint; denies that the "trash racks" were under the exclusive care, custody, and control of the defendant and his agents, servants or employees; denies that defendant had superior knowledge of Paul A. Jennings as to the cause of Paul A. Jennings' injuries; and denies that the said "trash racks" were caused to fall by any negligence or carelessness on the part of the defendant, his agents, servants, or employees.

4. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations [fol. 23] as to the nature and extent of injuries suffered by Paul A. Jennings and, therefore, denies the allegations set out in Paragraph 4 of the complaint.

5. Defendant further states that certain braces or supports had been placed by the defendant upon and about the said "trash racks" for the purpose of supporting and holding the Said "trash racks" and that prior to the time when the said "trash racks" fell certain of the said braces or supports had been removed by some person unknown to the defendant and without the defendant's knowledge. Defendant states that Paul A. Jennings either removed, or knew or ought to have known that some other person had removed, the braces or supports referred to and that Paul A. Jennings was negligent and careless in failing to advise the defendant, or his agents, servants, or employees that the said supports or braces had been removed and in con-

tinuing to work upon the said "trash racks" when he had knowledge that the said braces or supports had been removed.

6. Defendant further states that Paul A. Jennings voluntarily assumed the risk of the "trash racks" falling by working upon and about the said "trash racks" at the time and place complained of with full knowledge of the circumstances then existing.

WHEREFORE, defendant prays the Court that the complaint of Paul A. Jennings be dismissed, for his costs and all other proper relief.

WRIGHT, HARRISON, LINDSEY & UPTON,
1025 Pyramid Building,
Little Rock, Arkansas.

By ALSTON JENNINGS,
Attorneys for defendant.

[fol. 24] (Proof of Service omitted in printing)

[fol. 25] (Answer in Saint Paul-Mercury Indemnity Company Case, Civil No. 356)

(Filed in U. S. District Court on July 18, 1953)

In the United States District Court
Western District of Arkansas, Harrison Division

Saint Paul-Mercury Indemnity Company, Harry B. Hogan, doing business as Harry B. Hogan Painting Company, and Lonnie Sisney, Plaintiffs,

No. 356 vs. Civil

M. Lanza, doing business as Lake Charles Electric Company, Defendant.

Defendant, for answer to the complaint of the plaintiffs, states:

1. Defendant admits the allegations contained in paragraph 1 of the complaint.

2. Defendant admits that Harry B. Hogan had entered into a subcontract with defendant for the painting of certain trash racks, as alleged. Defendant admits that Lon-

nie Sisney was injured, but defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations concerning the nature and extent of such injuries and, therefore, denies that the injuries to Lonnie Sisney were serious and permanent. Defendant denies that injuries to Lonnie Sisney were caused by defendant, his agents, servants or employees.

3. Defendant denies all of the allegations of paragraph 3 of the complaint; denies that the "trash racks" were under the exclusive care, custody and control of defendant and his agents, servants or employees; and denies that the said "trash racks" were caused to fall by any negligence or carelessness on the part of the defendant, his agents, servants, or employees.

[fol. 26] 44. Defendant is without knowledge and information sufficient to form a belief as to the truth of the allegations as to the nature and extent of injuries suffered by Lonnie Sisney and, therefore, denies the allegations set out in paragraph 4 of the complaint.

5. Defendant admits the allegations contained in paragraph 5 of the complaint.

6. Defendant further states that certain braces or supports had been placed by the defendant upon and about the said "trash racks" for the purpose of supporting and holding the said "trash racks" and that prior to the time when the said "trash racks" fell certain of the said braces or supports had been removed by some person unknown to the defendant and without defendant's knowledge. Defendant states that Lonnie Sisney either removed, or knew or ought to have known that some other person had removed, the braces or supports referred to and that Lonnie Sisney was negligent and careless in failing to advise the defendant, or his agents, servants, or employees that the said supports or braces had been removed and in continuing to work upon the said "trash racks" when he had knowledge that the said braces or supports had been removed.

7. Defendant further states that Lonnie Sisney voluntarily assumed the risk of the "trash racks" falling by working upon and about the said "trash racks" at the time and place complained of with full knowledge of the circumstances then existing.

[fol. 27] WHEREFORE, defendant prays the Court that the complaint of the plaintiff's be dismissed, for his costs and all other proper relief.

WRIGHT HARRISON,
LINDSEY & UPTON,
1025 Pyramid Building,
Little Rock, Arkansas.

By ALSTON JENNINGS,
Attorneys for Defendant.

Proof of Service omitted in printing)

[fol. 28] (Motion of Harry B. Hogan, doing Business as Harry B. Hogan Painting Company and Saint Paul-Mercury Indemnity Company, to Intervene as Plaintiffs in Carroll Case, Civil No. 352)

(Filed in U. S. District Court on June 13, 1953)

District Court of the United States for the Harrison Division of the Western District of Arkansas.

Virgil G. Carroll, Plaintiff,
No. 352. vs.
M. Lanza, doing business as Lake Charles Electric Company, Defendant.

I.

Prior to January 26, 1953, the United States entered into a contract with the defendant, M. Lanza, doing business as Lake Charles Electric Company, under the terms of which the defendant was to perform certain work in connection with the construction of Bull Shoals Dam in Baxter County, Arkansas. Also prior to January 26, 1953, movant, Harry B. Hogan, doing business as Harry B. Hogan Painting Company, entered into a sub-contract with defendant for the painting of certain "trash racks" which were to be installed by defendant and made a part of said Bull Shoals Dam. Movant, Saint Paul-Mercury Indemnity Company, was at all times mentioned herein the insurance company carrying workmen's compensation insurance on plaintiff and other employees of movant, Harry B. Hogan, doing business as Harry B. Hogan Painting Company.

II.

On January 26, 1953, plaintiff, Virgil G. Carroll, received painful, serious and permanent injuries arising out of and in the course of his employment by movant, Harry B. Hogan, doing business as Harry B. Hogan Painting Company, which injuries were caused directly and proximately by the carelessness and negligence of the defendant, its agents, servants and employees, all of whom were acting within the scope of their employment.

[fol. 29]

III.

On or about March 2, 1953, plaintiff, Virgil B. Carroll, instituted this suit in the Circuit Court of Baxter County, Arkansas against M. Lanza, doing business as Lake Charles Electric Company (No. .....), in which he prayed judgment for 50,000.00 against said defendant on account of his injuries caused by defendant's carelessness and negligence aforesaid, copy of plaintiff's petition in said suit being attached hereto, marked Exhibit A and made a part of this motion. Said suit was brought pursuant to Section 40(a) of Initiated Act 4, adopted November 2, 1948. Thereafter defendant removed said cause to this court, where it is now pending.

IV.

Promptly upon the report to them of the injuries sustained by plaintiff as aforesaid, movants recognized their liability to him under the terms of the Arkansas Workmen's Compensation Act. As of June 1, 1953, movants had made compensation payments to and for plaintiff under said act in the amount of $1,439.55; and they have continued, and will continue, to make additional compensation payments to and for him under said act.

V.

Under Section 40(a) of said Initiated Act 4, movants are entitled to intervene herein as plaintiffs and to join with the plaintiff in this suit; and movants are also entitled to a first lien upon two-thirds of the net proceeds recovered in this action that remain after the payment of the reasonable costs of collection, for the payment to them of the amount paid and to be paid by them as compensation to the plaintiff.

Wherefore, movants, Harry B. Hogan, doing business as Harry B. Hogan Painting Company, and Saint Paul-Mercury Indemnity Company, pray the court to enter an order [fol. 30] herein permitting them to intervene herein as plaintiffs and to join with the plaintiff, Virgil G. Carroll, in this suit, and further pray the court to award them a first lien upon two-thirds of the net proceeds recovered in this action that remain after the payment of the reasonable costs of collection, for the payment to them of the amount paid and to be paid by them as compensation to the plaintiff; for costs and for all other proper relief.

GOODWIN & RIFFEL,
Attorneys for Movants,
Boyle Building,
Little Rock, Arkansas.

(Certificate of Service omitted in Printing)

[fol. 31] (Motion of Harry B. Hogan, doing Business as Harry B. Hogan Painting Company and Saint Paul-Mercury Indemnity Company to Intervene as Plaintiffs in Jennings Case, Civil No. 353)

(Filed in U. S. District Court on June 13, 1953)

District Court of the United States for the Harrison Division of the Western District of Arkansas.

Paul A. Jennings, a Minor, by O. E. Jennings, his Next Friend, Plaintiff,
No. 353. vs.
M. Lanza, doing business as Lake Charles Electric Company, Defendant.

I.

Prior to January 26, 1953, the United States entered into a contract with the defendant, M. Lanza, doing business as Lake Charles Electric Company, under the terms of which the defendant was to perform certain work in connection with the construction of Bull Shoals Dam in Baxter County, Arkansas. Also prior to January 26, 1953, movant, Harry B. Hogan, doing business as Harry B. Hogan Painting Company, entered into a sub-contract with defendant for the painting of certain "trash racks" which were to be installed

by defendant and made a part of said Bull Shoals Dam. Movant, Saint Paul-Mercury Indemnity Company, was at all times mentioned herein the insurance company carrying workmen's compensation insurance on plaintiff and other employees of movant, Harry B. Hogan, doing business as Harry B. Hogan Painting Company.

II.

On January 26, 1953, plaintiff, Paul A. Jennings, received painful, serious and permanent injuries arising out of and in the course of his employment by movant, Harry B. Hogan, doing business as Harry B. Hogan Painting Company, which injuries were caused directly and proximately by the carelessness and negligence of the defendant, its agents, servants and employees, all of whom were acting within the scope of their employment.

[fol. 32]

III.

On or about March 2, 1953, plaintiff, Paul A. Jennings, a minor, by O. E. Jennings, his next friend, instituted this suit in the Circuit Court of Baxter County, Arkansas against M. Lanza, doing business as Lake Charles Electric Company (No. .....), in which he prayed judgment for $25,000.00 against said defendant on account of his injuries caused by defendant's carelessness and negligence aforesaid, copy of plaintiff's petition in said suit being attached hereto, marked Exhibit A and made a part of this motion. Said suit was brought pursuant to Section 40 (a) of Initiated Act 4, adopted November 2, 1948. Thereafter defendant removed said cause to this court, where it is now pending.

IV.

Promptly upon the report to them of the injuries sustained by plaintiff as aforesaid, movants recognized their liability to him under the terms of the Arkansas Workmen's Compensation Act. As of May 18, 1953, movants had made compensation payments to and for plaintiff under said act in the amount of $887.80; and they have continned, and will continue, to make additional compensation payments to and for him under said act.

V.

Under Section 40 (a) of said Initiated Act 4, movants are entitled to intervene herein as plaintiffs and to join with the plaintiff in this suit; and movants are also entitled to a first lien upon two-thirds of the net proceeds recovered in this action that remain after the payment of the reasonable costs of collection, for the payment to them of the amount paid and to be paid by them as compensation to the plaintiff.

Wherefore, movants, Harry B. Hogan, doing business as Harry B. Hogan Painting Company, and Saint Paul-Mercury Indemnity Company, pray the court to enter an order herein permitting them to intervene herein as plaintiffs and to join with the plaintiff, Paul A. Jennings, a minor, by [fol. 33] O. E. Jennings, his next friend, in this suit, and further pray the court to award them a first lien upon two-thirds of the net proceeds recovered in this action that remain after the payment of the reasonable costs of collection, for the payments to them of the amount paid and to be paid by them as compensation to the plaintiff; for costs and for all other proper relief.

GOODWIN & RIFFEL.
Attorneys for Movants,
Boyle Building,
Little Rock, Arkansas.

(Certificate of Service omitted in printing)

[fol. 34] (Order granting leave to Harry B. Hogan, doing Business as Harry B. Hogan Painting Company and Saint Paul-Mercury Indemnity Company, to Intervene as Plaintiffs in Carroll Case, Civil No. 352)

(Filed in U. S. District Court on June 27, 1953)

District Court of the United States
For the Harrison Division of the Western District of Arkansas

Virgil G. Carroll, Plaintiff,

No. 352 vs.

M. Lanza, doing business as Lake Charles Electric Company, Defendant.

Now on this 27 day of June, 1953, this cause came on to be heard upon the motion of Harry B. Hogan, doing business as Harry B. Hogan Painting Company, and Saint Paul-Mercury Indemnity Company, for leave to intervene as plaintiffs in this cause and for other purposes.

And the court being well and fully advised in the premises,

It is ordered that movants, Harry B. Hogan, doing business as Harry B. Hogan Painting Company and Saint Paul-Mercury Indemnity Company be, and they are hereby, allowed to intervene herein as plaintiffs and to join with the plaintiff, Virgil G. Carroll, in this suit.

The court defers, until final hearing, its ruling upon the prayer of the motion for an award to movants of a first lien upon two-thirds of the net proceeds, if any, recovered in this action that remain after the payment of the reasonable costs of collection, for the payment to movants of the amount, if any, paid and to be paid by them as compensation to the plaintiff, Virgil G. Carroll.

JOHN E. MILLER,
United States District Judge.

Approved:

RIDDICK RIFFEL,
Attorneys for Movants.

HAROLD FISHER,
Attorneys for Plaintiff.

ALSTON JENNINGS,
Attorneys for Defendant.

[fol. 35] (Order granting Leave to Harry B. Hogan, doing Business as Harry B. Hogan Painting Company and Saint Paul-Mercury Indemnity Company, to Intervene as Plaintiffs in Jennings Case, Civil No. 353)

(Filed in U. S. District Court on June 27, 1953)

District Court of the United States
For the Harrison Division of the
Western District of Arkansas

Paul A. Jennings, a Minor, by O. E. Jennings, his Next Friend, Plaintiff,

vs. No. 353

M. Lanza, doing business as Lake Charles Electric Company, Defendant.

Now on this 27 day of June, 1953, this cause came on to be heard upon the motion of Harry B. Hogan, doing business as Harry B. Hogan Painting Company, and Saint Paul-Mercury Indemnity Company, for leave to intervene as plaintiffs in this cause and for other purposes.

And the court being well and fully advised in the premises,

It is ordered that movants, Harry B. Hogan, doing business as Harry B. Hogan Painting Company and Saint Paul-Mercury Indemnity Company be, and they are hereby, allowed to intervene herein as plaintiffs and to join with the plaintiff, Paul A. Jennings, a minor, by O. E. Jennings, his next friend, in this suit.

The court defers, until final hearing, its ruling upon the prayer of the motion for an award to movants of a first lien upon two-thirds of the net proceeds, if any, recovered in this action that remain after the payment of the reasonable costs of collection, for the payment to movants of the amount, if any, paid and to be paid by them as compensation to the plaintiff, Paul A. Jennings.

JOHN E. MILLER,
United States District Judge.

Approved:

RIDDICK RIFFEL,
Attorneys for Movants.

HAROLD FISHER,
Attorneys for Plaintiff.

ALSTON JENNINGS,
Attorneys for Defendant.

[fol. 36] (Order consolidating Carroll, Jennings and Saint Paul-Mercury Indemnity Company Cases and for Trial without Jury)

(Filed in U. S. District Court on September 1, 1953)

United States District Court
Western District of Arkansas
Harrison Division

Virgil G. Carroll, Plaintiff,

No. 352 vs. Civil Action

M. Lanza, d/b/a Lake Charles Electric Co., Defendant; Harry B. Hogan, d/b/a Harry B. Hogan Painting Company, and Saint Paul-Mercury Indemnity Company, Intervenors.

Paul A. Jennings, a minor, by O. E. Jennings, his next friend, Plaintiff,

No. 353 vs. Civil Action

M. Lanza, d/b/a Lake Charles Electric Co., Defendant; Harry B. Hogan, d/b/a Harry B. Hogan Painting Company, and Saint Paul-Mercury Indemnity Company, Intervenors.

Saint Paul-Mercury Indemnity Company, Harry B. Hogan, doing business as Harry B. Hogan Painting Company, and Lonnie Sisney, Plaintiffs,

No. 356 vs. Civil Action

M. Lanza, doing business as Lake Charles Electric Company, Defendant.

On this the first day of September, 1953, by consent of counsel for the parties, it is ordered that the three actions above styled, and heretofore consolidated for the purpose of trial, be stricken from the trial calendar for the September, 1953, term in the Harrison Division of this court; counsel having agreed that said consolidated actions be tried to the court, without the intervention of a jury, at Fort Smith, in the Western District of Arkansas, on a date hereafter to be fixed.

JNO E. MILLER,
United States District Judge.

[fol. 37] (Motion of Defendant for Judgment on Pleadings or Summary Judgment in Saint Paul-Mercury Indemnity Case and Jennings Case)

(Filed in U. S. District Court on October 16, 1953)

In the United States District Court
Western District of Arkansas, Harrison Division

Saint Paul-Mercury Indemnity Company, Harry B. Hogan, doing business as Harry B. Hogan Painting Company, and Lonnie Sisney, Plaintiffs,

No. 356 vs. Civil

M. Lanza, doing business as Lake Charles Electric Company, Defendant,

and

Paul A. Jennings, a minor, by O. E. Jennings, his Next Friend, Plaintiff,

No. 353 vs. Civil

M. Lanza, d/b/a Lake Charles Electric Company, Defendant,

Harry B. Hogan, d/b/a Harry B. Hogan Painting Company, and Saint Paul-Mercury Indemnity Company, Intervenors.

The pleadings herein having been closed, defendant moves the Court for a judgment on the pleadings in favor of the defendant and against the plaintiffs on their complaints; and further moves the Court for a judgment on the pleadings in favor of the defendant and against the intervenors on their interventions. As its ground therefor, defendant states that the undisputed facts appearing from the pleadings show that the defendant is entitled to judgment as a matter of law.

[fol. 38] In the alternative, defendant moves upon the pleadings herein and upon the deposition of the plaintiff, Lonnie Sisney, filed herein, and upon all the records, files and proceedings in this cause, for summary judgment in favor of the defendant and against the intervenors upon the ground that on the undisputed facts appearing from the

pleadings and the said stipulation the defendant is entitled to a judgment as a matter of law.

WRIGHT, HARRISON,
LINSEY & UPTON,
1025 Pyramid Building,
Little Rock, Arkansas.

By ALSTON JENNINGS,
Attorneys for Defendant.

(Proof of Service omitted in printing)

[fol. 39] (Order of District Court overruling Motion of Defendant for Judgment on Pleadings or Summary Judgment in Saint Paul-Mercury Indemnity Company Case and Jennings Case)

(Filed in U. S. District Court on October 16, 1953)

On this October 16, 1953, upon consideration of defendant's motion for judgment on the pleadings or for summary judgment, and being well and sufficiently advised in the premises,

It Is Ordered And Adjudged that the said motion for judgment on the pleadings or for summary judgment be and the same hereby is overruled.

JNO. E. MILLER,
United States District Judge.

[fol. 40] (Motion of Defendant for Summary Judgment in Carroll Case, Civil No. 352)

(Filed in U. S. District Court on October 16, 1953)

In the United States District Court
Western District of Arkansas, Harrison Division

Virgil G. Carroll, Plaintiff,

No. 352 vs. Civil

M. Lanza, d/b/a Lake Charles Electric Company, Defendant,

Harry B. Hogan, d/b/a Harry B. Hogan Painting Company, and Saint Paul-Mercury Indemnity Company, Intervenors.

Defendant moves the Court to enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in the defendant's favor dismissing the action on the ground that on the undisputed facts appearing from the pleadings and from the deposition of the plaintiff filed herein the defendant is entitled to a judgment as a matter of law.

WRIGHT, HARRISON,
LINDSEY & UPTON,
1025 Pyramid Building,
Little Rock, Arkansas.

By ALSTON JENNINGS,
Attorneys for Defendant.

(Proof of Service omitted in printing)

[fol. 41] Extract from Deposition of Virgil G. Carroll

In a deposition taken at the request of the defendant on August 27, 1953, Virgil G. Carroll testified at page 33 that he was receiving workmen's compensation under the Missouri Workmen's Compensation Act.

[fol. 42] (Memorandum relating to Exhibits attached to Brief submitted by Counsel for Virgil Carroll, et al., in opposition to Motion of Defendant for Summary Judgment)

The following exhibits A, B, C, D, E and F were attached to a brief submitted by counsel for Virgil Carroll, St. Paul-Mercury Indemnity Company and Harry B. Hogan in opposition to appellant's motion for summary judgment in the Carroll case.

They were filed Oct. 24, 1953.

[fol. 43] Exhibit "A"

(Filed in U. S. District Court on October 24, 1953)

October 21, 1953

Workmens Compensation Commission
8th & Cumberland
Little Rock, Arkansas

Claim 53,900571
Assured—Hogan Painting Co.
Claimant—Virgil Carroll
d/a 1/26/53 WC

Gentlemen:

Attached is Employers First Report of Industrial Injury, form A-8, Report of Initial Payment of Compensation, form A-9, and Surgeon's report, form A-12, in this case.

Though this claimant was injured January 26, 1953, he has only on October 10, 1953, elected to receive his compensation benefits in accordance with the Arkansas Workmens Compensation Act. You will note that Mr. Carrol was injured near Bull Shoals, Arkansas, while employed by the Harry B. Hogan Painting Company, which concern is insured by our Company in Arkansas as well as in Missouri.

We have no objection to Mr. Carroll's election to receive his benefits under the Arkansas Act. He has been paid compensation by our representatives in Missouri at the rate of $30.00 per week, but we are informed that his injury was not reported to the Missouri Compensation Commission, and that Mr. Carroll had not, prior to October 10, 1953 exercised any election regarding the state under whose laws he would be paid compensation. We attach for the completion of the file a photostatic copy of his signed letter of October 10, 1953, indicating his desire to receive compensation benefits in Arkansas.

In view of the fact that this claimant has been paid compensation at the rate of $30.00 per week through September 21, for a total of 34 weeks, there is an overpayment to him in the amount of $170.00. We are withholding the payment of further compensation for permanent partial dis-

ability for such period of time necessary to make up for this overpayment.

Yours very truly

ST. PAUL MERCURY
INDEMNITY CO.

George C. Koonce, Jr.
Claims Manager

gck/em
encl:

[fol. 44] Exhibit "B"

(Filed in U. S. District Court on October 24, 1953)

Law Offices
Allen, Woolsey & Fisher
Woodruff Building
Springfield, Missouri

Telephone 4-1581

October 10, 1953

Mr. Curtis S. Barton, Claims Manager
St. Paul Mercury Indemnity Company
1008 Insurance Exchange Building
Kansas City 6, Missouri

Re: Virgil Carroll

Dear Mr. Barton:

You are now carrying in your files a compensation claim of mine resulting from an accident which occurred on January 26, 1953, at which time I was an employee of your assured, Harry B. Hogan, dba Harry B. Hogan Painting Company. Prior to the date of January 26, 1953, I was hired in the State of Missouri by Mr. Hogan and on the date of January 26, 1953, while working at or near the Bull Shoals Dam Site in Baxter County, Arkansas I received injuries while doing work arising out of and in the course of my employment with Harry B. Hogan Painting Company.

The law office of Allen, Woolsey & Fisher, Springfield, Missouri, has been handling this compensation claim in

your behalf and started paying me compensation benefits which, as I new understand, were paid under the provisions of the Missouri Workmen's Compensation Act. It has now been called to my attention that I now have and at the time of the accident had a right of election to be paid compensation under the terms of the Workmen's Compensation Act of Missouri or under the Workmen's Compensation Act of Arkansas, in view of the fact that I was hired in Missouri and was injured while working in Arkansas. Before this date I was not aware of the right of election on my part and I now wish to advise you of my election.

I request that all compensation benefits which I may have as a result of the injuries sustained on January 26, 1953 be paid to me in accordance with the terms of the Workmen's Compensation Act of the State of Arkansas and not under the terms of the Workmen's Compensation Act of the State of Missouri. In other words, I want my claim to be considered as an Arkansas Compensation claim.

Please make the proper adjustments in regard to payments which have been made to date and in future payments which are to be made to me on my compensation claim.

Yours very truly,
VIRGIL G. CARROLL.

[fol. 45] Exhibit "C"

(Filed in U. S. District Court on October 24, 1953)

If It's Wiring
We Can Do It

Lighting
Fixtures

Lake Charles Electric Company
Electrical Contracting
P. O. Box 1427
Lake Charles, La.

January 22, 1952

Cont. DA-1246, Bull Shoals Project
Pay Item 68, Painting

This contract, made this 22nd day of January, 1952, between the Harry B. Hogan Painting Company, Springfield,

Missouri, and M. Lanza, dba, Lake Charles Electric Company in Lake Charles, Louisiana.

Whereas the Lake Charles Electric Company is now engaged in a contract with the U. S. Government at Bull Shoals, Arkansas under Contract DA-1246, covering Items 1 through 68 in Lot 1 of said contract.

The Harry B. Hogan Painting Company hereby agrees to furnish all labor, material and necessary scaffolds and ladders to perform all painting in the above contract according to plans and specifications and addendum 1 and 2. The Lake Charles Electric Company will in return compensate the Harry B. Hogan Painting Company to perform this work as follows:

General Painting	$8,160.00
Painting Penstock Gate Assembly, including all structural steel and equipment.....	1,730.00

It is understood that the Harry B. Hogan Painting Company will furnish necessary men as the job progresses and will be held responsible for any delays that may be caused through his part of this contract.

It is further understood that the Harry B. Hogan Painting Company will carry the necessary insurance on his men in according with the rules of the state of Arkansas.

LAKE CHARLES
ELECTRIC COMPANY

/s/ M. Lanza

HARRY B. HOGAN
PAINTING COMPANY

/s/ Harry B. Hogan

Witnesses:

/s/ Shirley Dunham

/s/ Robert B. Murray

"Good Work Our Success"

[fol. 46] Exhibit "D"

(Filed in U. S. District Court on October 24, 1953)

(Affidavit of Virgil G. Carroll)

State of Missouri,
County of Greene.—ss.:

My address is R F D 3, Springfield, Missouri.

On January 26, 1953, while employed by Harry B. Hogan, doing business as Harry B. Hogan Painting Company, I was injured in the course of my employment while engaged in painting certain trash racks near the Bull Shoals Dam Site in Baxter County, Arkansas.

Shortly thereafter, the Saint Paul-Mercury Indemnity Company, which carried workmen's compensation insurance on my employer, began paying compensation benefits to me. I made no election, to my employer or to the carrier, as to the State under whose laws these benefits would be paid to me. I found out later that compensation benefits were being paid to me under the law of Missouri.

It was not until October 10, 1953 that I found out that I could have elected to receive compensation benefits under the law of Arkansas. As soon as I was advised to that effect, I wrote a letter, dated October 10, 1953, to the Saint Paul-Mercury Indemnity Company, Kansas City, Missouri and sent a copy of it to the company's office at Little Rock, Arkansas. The letter requested that my compensation benefits be computed under the Workmen's Compensation Act of Arkansas instead of the Workmen's Compensation Act of Missouri; in other words, that my claim be considered a claim under the Arkansas Act. The letter further authorized the company to make appropriate adjustments, plus or minus, in payments that had already been made to me. A copy of the letter is attached to this affidavit as Exhibit "A".

If I had known all along that I had the right to receive compensation benefits under the Workmen's Compensation Act of Arkansas, I would, immediately after I was injured, have requested that these benefits be paid to me under the law of Arkansas instead of under the law of Missouri.

This 20th day of October, 1953.

VIRGIL G. CARROLL.

Subscribed and sworn to before me, a Notary Public, this 20th day of October, 1953.

HELEN BARNABY,
(Seal) Notary Public.

My Commission will expire: June 25, 1955.

[fol. 47] Exhibit "E".

(Filed in U. S. District Court on October 24, 1953)

(Affidavit of Harold J. Fisher)

State of Missouri,
County of Greene—ss.:

I, HAROLD J. FISHER, Attorney at Law, of Springfield, Mo., hereby state and aver that the law office of Allen, Woolsey & Fisher, of which firm I am a member, represents the St. Paul Mercury Indemnity Company, which company is the workmen's compensation insurer for Harry B. Hogan, doing business as Harry B. Hogan Painting Company, in connection with an injury suffered by Virgil G. Carroll, an employee of the Hogan Painting Company, on January 26, 1953, which injury resulted from an accident near the Bull Shoals Dam site in Baxter County, Arkansas.

This matter was first referred to us by the insurance agency of Murray and Kent, of Springfield, Missouri, which agency had written the workmen's compensation insurance for Mr. Hogan and had placed this coverage in the St. Paul Mercury Indemnity Company. This office began making compensation payments to Mr. Carroll in accordance with the Workmen's Compensation Act of the State of Missouri without ever having advised Mr. Carroll of his right of election to have the benefits paid to him under the jurisdiction of the Workmen's Compensation Act of the State of Arkansas. This office had the only contact between Mr. Carroll and the St. Paul Mercury Indemnity Company, and as stated above, this office was hired by the St. Paul Mercury Indemnity Company to represent their interest in this case.

On or about October 10, 1953, I advised Mr. Carroll of his right to elect to receive compensation benefits under either the Workmen's Compensation Act of the State of Arkansas or of the State of Missouri, and on that date he wrote a letter to the St. Paul Mercury Indemnity Company at Kansas City, Missouri, which office has jurisdiction of compensation claims in this territory, a copy of said letter being sent to St. Paul Mercury Indemnity Company office at Little Rock, Arkansas. This letter requested that Mr. Carroll's compensation benefits be computed under the Workmen's Compensation Act of the State of Arkansas and not the Workmen's Compensation Act of the State of Missouri. The benefits under both acts were explained to Mr. Carroll by myself, and it was decided by Mr. Carroll that he preferred to have the benefits paid to him in accordance with the Workmen's Compensation Act of the State of Arkansas. Mr. Carroll himself had never made any election prior to this date.

[fol. 48] There had never been filed with the Division of Workmen's Compensation of the State of Missouri any report of injury or any other notice of this accident or injury of Mr. Carroll's, so this claim was never brought within or under the jurisdiction of the Workmen's Compensation Commission of the State of Missouri. Mr. Carroll never at any time signed any papers, receipts, or any other such thing whereby he acknowledged the fact that he was receiving benefits under the Workmen's Compensation Act of the State of Missouri, or whereby he stated that he elected to have his benefits paid to him under the terms of the Workmen's Compensation Act of the State of Missouri.

HAROLD J. FISHER.

Subscribed and sworn to before me this 20th day of October, 1953.

(Notary Seal)

HELEN BARNABY,
Notary Public.

My Commission expires June 25, 1955.

[fol. 49] Exhibit "F".

(Filed in U. S. District Court on October 24, 1953)

Workmen's Compensation Commission
State of Arkansas
723 Cumberland Street
Little Rock

O. W. Holmes
Commissioner

Dave Peel
Chairman

Arnold B. Sikes
Commissioner

Certificate.

I, Dave Peel, Chairman of the Arkansas Workmen's Compensation Commission, hereby certify as follows with reference to the claim of Virgil Carroll against the Hogan Painting Company:

On October 22, 1953, there were filed with this Commission the following papers in connection with the above claim: (1) the original letter of George C. Koonce, Jr., Claims Manager, Saint Paul-Mercury Indemnity Company, dated October 21, 1953 and addressed to this Commission, copy of said letter being attached hereto as Exhibit "A", together with Employer's First Report of Industrial Injury, Form A-8; Report of Initial Payment of Compensation, Form A-9, and Surgeon's Report, Form A-12, referred to in the first paragraph of said letter; and (2) a photostatic copy of the signed letter of the claimant, Virgil G. Carroll, dated October 10, 1953 and addressed to Mr. Curtis S. Barton, Claims Manager, Saint Paul-Mercury Indemnity Company, 1008 Insurance Exchange Building, Kansas City 6, Missouri, referred to in the third paragraph of the letter attached hereto as Exhibit "A", copy of said letter of the said Virgil G. Carroll being attached hereto as Exhibit "B".

Upon filing of the above mentioned papers, the Commission accepted said filing and assigned thereto its Claim No. A329223.

This the 22nd of October, 1953.

(Seal)

DAVE PEEL,
Chairman.

[fol. 50] (Motion of Defendant to require Interveners to produce certain Documents in Carroll Case, Civil No. 352)

(Filed in U. S. District Court on October 27, 1953)

In the United States District Court, Western District of Arkansas, Harrison Division.

Virgil G. Carroll, Plaintiff,
No. 352. vs. Civil.
M. Lanza, d/b/a Lake Charles Electric Company, Defendant.

Harry B. Hogan, d/b/a Harry B. Hogan Painting Company, and St. Paul-Mercury Indemnity Company, Interveners.

Defendant M. Lanza moves the Court for an order requiring interveners St. Paul-Mercury Indemnity Company and Harry B. Hogan to produce and to permit defendant to inspect and to copy each of the following documents:

All documents of any and every kind whatsoever contained in the file of St. Paul-Mercury Indemnity Company and Harry B. Hogan, whether in the hands of their agents, employees or attorneys or any other person; at Little Rock, Arkansas, Springfield, Missouri, St. Louis, Missouri, or any other place; related to or in any manner bearing upon the claim of Virgil G. Carroll for compensation benefits and compensation payments made to Virgil G. Carroll as the result of an accident of January 26, 1953, at the Bull Shoals Dam Site in Baxter County, Arkansas, at which time the said Virgil G. Carroll was an employee of Harry B. Hogan.

Interveners, Harry B. Hogan, d/b/a Harry B. Hogan Painting Company, and St. Paul-Mercury Indemnity Company have the possession, custody, or control of the foregoing documents, and they constitute or contain evidence relevant and material to a matter involved in this action.

WRIGHT, HARRISON, LINDSEY & UPTON,
1025 Pyramid Building,
Little Rock, Arkansas.
By Alston Jennings,
Attorneys for Defendant.

[fol. 51] (Certificate of Service omitted in printing)

[fol. 52] (Order of District Court overruling Motion of Defendant for Summary Judgment in Carroll Case, etc., Civil No. 352)

November 5, 1953.

At the beginning of the trial, and before any testimony was introduced, the Court advised counsel that he was overruling the motion for summary judgment in the Carroll case, No. 352, for procedural reasons, with leave to the defendant to renew the motion at the conclusion of the testimony or such other time as the defendant might desire.

[fol. 53] (Opinion, Findings of Fact and Conclusions of Law in Carroll, Jennings and Saint Paul-Mercury Indemnity Company cases)

(Filed in U. S. District Court on November 13, 1953)

In the United States District Court, Western District of Arkansas, Harrison Division.

Virgil G. Carroll, Plaintiff,
No. 352. vs. Civil Action.
M. Lanza, d/b/a Lake Charles Electric Company, Defendant.

Harry B. Hogan, d/b/a Harry B. Hogan Painting Company, and Saint Paul-Mercury Indemnity Company, Interveners

and

Paul A. Jennings, a minor, by O. E. Jennings, his Next Friend, Plaintiff,
No. 353. vs. Civil Action.
M. Lanza, d/b/a Lake Charles Electric Company, Defendant.

Harry B. Hogan, d/b/a Harry B. Hogan Painting Company, and Saint Paul-Mercury Indemnity Company, Interveners

and

Saint Paul-Mercury Indemnity Company, Harry B. Hogan, d/b/a Harry B. Hogan Painting Company, and Lonnie Sisney, Plaintiffs,
No. 356. vs. Civil Action.
M. Lanza, d/b/a Lake Charles Electric Company, Defendant.

Statement.

Hereinafter, the plaintiff, Virgil C. Carroll, will be referred to as Carroll; the plaintiff, Paul A. Jennings, as Jennings; the plaintiff, Saint Paul-Mercury Indemnity Company, as the Indemnity Company; the plaintiff, Lonnie Sisney, as Sisney; the plaintiff and intervener, Harry B. Hogan, as Hogan; and the defendant, M. Lanza, as Lanza.

The plaintiffs, Carroll and Jennings, each filed separate suits against the defendant, Lanza, in the Circuit Court of Baxter County, Arkansas, and on March 20, 1953, both [fol. 54] of the cases were removed by the defendant to this Court on the grounds of diversity of citizenship and the amount involved. On March 27, 1953, the said defendant filed answers in the above mentioned cases.

On June 13, 1953, the plaintiffs, Sisney, Hogan and the Indemnity Company filed their complaint against the defendant, Lanza.

On June 27, 1953, the Court entered orders permitting Hogan and the Indemnity Company to intervene as plaintiffs in the Carroll and Jennings cases.

The defendant, on July 18, 1953, filed his answer to the complaint of Sisney, Hogan and the Indemnity Company.

The three cases all arose out of the same occurrence, and at the pre-trial conference on August 31, 1953, counsel for all the parties agreed that the cases should be consolidated for trial and final disposition. The Court entered a pre-trial order consolidating the cases, and further reciting that plaintiffs would not insist upon the application of the doctrine of res ipsa loquitur but that the cases should be tried upon a negligence theory.

On September 1, 1953, upon consent of counsel for the parties, the Court entered an order striking the cases from the trial calendar in the Harrison Division, upon agreement of the said counsel that the cases be tried to the Court, without a jury, at Fort Smith, in the Western District of Arkansas, at a later date.

On October 16, 1953, defendant filed motions for summary judgment in each of the three cases, and on the same date the Court denied the defendant's said motions in the Sisney

and Jennings cases on the authority of Anderson, et al. vs. Sanderson & Procter, et al., 8 Cir., 146 F. 2d 58. The Court deferred its ruling on defendant's motion for sum- [fol. 55] mary judgment in the Carroll case until the day of the trial, at which time the Court denied the motion for the reason that there appeared from an examination of the affidavits and depositions on file in support of and in opposition to the motion a question of fact regarding the alleged election of Carroll to accept compensation benefits under the Missouri Workmen's Compensation Law instead of the Arkansas Act.

On November 5 and 6, 1953, the cases were tried to the Court, without a jury and at the conclusion of plaintiffs' evidence, the defendant moved for judgment in its favor in each of the three cases on the merits. The defendant also moved for judgment in the Carroll case on the specific ground that he had elected to accept compensation payments under the Missouri Workmen's Compensation Law, and that such remedy was exclusive, thus precluding the institution of this suit by Carroll. The Court denied defendant's motion in all of the cases on the merits, but deferred its decision on the specific motion attacking the jurisdiction of the Court in the Carroll case until the conclusion of the trial on the merits.

Now, the Court, having considered the pleadings, oretenus testimony of the witnesses, exhibits, stipulations written briefs and oral arguments of the attorneys for the respective parties, makes and files herein its findings of fact and conclusions of law, separately stated.

Findings of Fact.

1.

The plaintiffs, Carroll and Hogan, are citizens and residents of Missouri. The plaintiffs, Jennings and Sisney, are citizens and residents of Arkansas. The plaintiff, Indemnity Company, is a corporation organized and existing under the laws of Delaware, and is the insurance company carrying workmen's compensation insurance on Hogan and his [fol. 56] employees. The defendant, Lanza, is a citizen and resident of Louisiana. The amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00 in each of the three cases.

II.

Carroll was a foreman and a regular employee of Hogan and had been for several years. Both Carroll and Hogan were and are residents of Missouri and the employment contract between them was entered into in that State. The accident involved herein occurred in Arkansas.

The defendant, Lanza, had a contract with the United States Government in connection with the construction of the Bull Shoals Dam in Arkansas. On January 22, 1952, Hogan entered into a contract with Lanza whereby Hogan agreed to furnish all labor, material and necessary scaffolds and ladders to perform all the general painting required by the contract Lanza had with the Government. A supplemental contract was entered into for the painting of the "trash racks" as set forth in finding of fact Number 3.

Hogan had secured [workmen's] compensation insurance from the Indemnity Company covering his employees in both Arkansas and Missouri. Subsequent to the accident, Carroll received thirty-four weekly payments of $30 each in accordance with the Workmen's Compensation Law of Missouri. These payments were made by drafts drawn on the Indemnity Company and were delivered to Carroll by Mr. Fisher of the firm of Allen, Woolsey & Fisher, attorneys representing the Indemnity Company.

In March, 1953, Carroll instituted the present suit. Sometime prior to October 10, 1953, defendant's attorney transmitted to Carroll's attorney a proposed stipulation to the effect that Carroll was receiving compensation under the Missouri Law. The stipulation was not executed and on October 10, 1953, after consulting his attorney, Carroll [fol. 57] wrote to the Indemnity Company informing said company that he desired to receive his compensation under the Arkansas Workmen's Compensation Law rather than the Missouri Law. Prior to consulting his attorney on October 10, 1953, Carroll did not know that he had the right to receive compensation under the Arkansas law, and, in fact, he did not know that the $30 weekly payments were being made under the Missouri law. In other words, Mr. Fisher and the Indemnity Company handled the matter, and all Carroll knew was that he was receiving $30 per week compensation from the Indemnity Company. Carroll signed

nothing acknowledging the fact that he was receiving compensation under the Missouri Law, and no report of injury or any other notice of the accident or injury to Carroll was ever filed by Carroll with the Division of Workmen's Compensation of the State of Missouri, but he depended upon his present attorneys, Allen, Woolsey & Fisher, who were and are the attorneys for the Indemnity Company, to look after the collection and payment of benefits under the Workmen's Compensation Act.

After receiving the letter from Mr. Carroll, the Indemnity Company wrote to the Arkansas Workmen's Compensation Commission concerning Carroll's desire to receive compensation pursuant to the Arkansas Law. In its letter to the Commission the Indemnity Company enclosed Employer's First Report of Industrial Injury, Form A-8; Report of Initial Payment of Compensation, Form A-9; Surgeon's Report, Form A-12; and a photostatic copy of Carroll's letter to the Indemnity Company. Upon filing of the above mentioned papers, the Arkansas Workmen's Compensation Commission accepted said filing and assigned thereto its Claim No. A329223 and Carroll is now receiving weekly benefits of $25.00 under the Workmen's Compensation Laws of Arkansas.

[fol. 58] III.

By letter of November 7, 1952, Hogan submitted to Lanza a bid to paint eighteen "trash racks". The letter provided, inter alia, "After racks have been set in upright position and arranged so as to be accessable for painting, all areas are to be cleaned of rust by wire brushing and sandpaper and given three coats of Coal Tar Paint as specified by Army Engineers. * * * The above price does not include sand-blasting or setting racks in position for painting." On November 14, 1952, defendant, by letter, aathorized Hogan to proceed with the painting "as proposed in your letter dated November 7, 1952."

It was necessary to enter into this supplemental contract because the original contract between Lanza and the Government did not cover the painting of the trash racks.

The "Trash racks" referred to herein are constructed as follows:

The outside metal frames when in an upright position are approximately 13 feet long, 10 feet high, and 12 inches wide. Inside the frames there are four cross bars extending across said frames parallel to the ground and about 2 feet apart. Also inside the frames there are 25 steel "fins" which are approximately 10 feet long, 5 inches wide, and ⅞ [on] an inches thick . When the racks are in an upright position, the fins are perpendicular to the ground and 10 feet high, i.e., approximately the height of the rack. The sides of the fins which are 5 inches wide are parallel to the ten-foot ends of the outside frames. Approximately 3 inches of the width of each fin is within the frame and 2 inches of each fin protrudes from the frame. In other words, a side view of a trash rack in an upright position discloses the 12-inch side of the solid metal frame with the fins protruding 2 inches out of the frame for the full height of the rack, making a total width of 14 inches including the [fol. 59] fins. The fins in a rack weight approximately 4,000 pounds and the remainder of the rack weighs approximately 1,400 pounds, constituting a total weight of 5,400 pounds. Therefore, the side of the frame from which the fins protrude weighs a great deal more than the opposite side and the center of gravity was not in the center of the twelve inch base but to the side from which the fins protruded. On the top of each trash rack are two "lifting eyes", one toward each end of the rack. The lifting eyes are curved metal bars, both ends of which are attached to the top of the trash rack, and these lifting eyes are evidently designed to facilitate the moving and handling of the trash racks.

In the latter part of November, 1952, defendant's employees delivered the trash racks to the place where they were to be painted, which place was south of the Bull Shoals Dam and east of the river. The racks were first stacked flat on the ground in six stacks of three racks each. While the racks were in this position, Carroll, Jennings and Sisney cleaned and painted the outer flat surfaces of the racks and some of the fins. Following that, defendant's employees set the racks in an upright position to be painted by Hogan's employees. The racks were set up as follows:

Pieces of 2" by 12" lumber from two to four feet long were placed on the ground and two railroad rails were placed on the boards. The rails were placed parallel to

each other, about eight or nine feet apart, and were running from south to north. Defendant's employees used a carpenter's level and placed the rails in such a manner as to make them absolutely level. After the rails were placed, defendant's employees used a truck with an A frame to lift the racks and place them upright on the rails so that the racks rested across said rails and perpendicular thereto. As the racks were put in place, about three feet apart, two [fol. 60] "spreader braces" were cut and placed between each two adjacent racks. The spreader braces consisted of 2" by 4" pieces about three feet long to which two short pieces of 1" by 4" were nailed. A spreader brace was made by measuring the distance between the two adjacent racks and sawing a 2" by 4" to that length. The 2" by 4" was placed flat and a short piece of 1" by 4" was placed, also flat, on each end of the 2" by 4" and extending out a few inches beyond the end thereof. The two pieces of 1" by 4" were nailed to the 2" by 4", thus completing the spreader brace. When the spreader braces were completed and were placed between two racks, the short pieces of 1" by 4" rested on top of the racks supporting the 2" by 4" which rested between the racks. When in position, the spreader braces were parallel to the rails and near the lifting eyes of the adjacent racks. The braces were not attached to the racks in any manner, but merely rested on top of the racks as above described.

The preceding procedure was followed until 10 racks were set upright on the two parallel rails. Then the end racks were anchored by double strands of number 9 wire attached to the lifting eyes and extending to metal pins which were set in the ground a few feet from the said end racks. Also, each two adjacent racks were fastened to each other by means of number 9 wire which was attached to the lifting eyes of the said adjacent racks. Thus, each rack was attached to the next in two places, i.e., from the two lifting eyes on one rack to the two lifting eyes on the next rack, and the two end racks were each supported by two guy wires extending to metal pins in the ground. All the wires ran parallel to the steel rails.

After the ten racks were placed, another set of two rails was placed east of the said ten racks and parallel to the first set of rails. Then, eight racks were placed on the second

[fol. 61] set of rails in the same manner as the first ten racks were placed, the only difference in the placing of the two sets of racks being that the southeast guy wire in the eight rack row was attached to the rail rather than a metal pin. All the racks in the eight rack row except one were placed so that the fins were toward the north. When the eight rack row was completed, there was an aisle of approximately four feet between said row and the ten rack row. All of the aforesaid work connected with the setting of the racks in an upright position was done by the defendant's employees as required by the contract between Hogan and Lanza.

Carroll was notified that the racks had been placed in position, and he, Jennings and Sisney proceeded with the painting of the racks. They first used power sanders and power buffers to clean the racks. Then they applied a primer coat and a second coat to the racks, and on the day of the accident, January 26, 1953, they were applying the third and final coat of paint to the eight racks. Up to the day of the accident about seven weeks had elapsed since the painting of the racks began and since they had been placed in position for painting. Their work was intermittent for two reasons, (1) they could paint only when the temperature was above 50° and (2) they could not paint when excessive moisture was on the racks. Thus, during the seven weeks they had actually worked only 160 man hours on the racks. The work, at best, was fairly slow because it was necessary to heat the paint to 100° before it could be applied. The paint was applied with a regular heavy duty four inch brush. It was necessary to use a scaffold for the painting of the upper portions of the racks, and such a scaffold was made by placing three 2″ by 4″ pieces parallel to the rails, each 2″ by 4″ resting on the cross bars of the two adjacent racks. Then a 2″ by 8″ work plank was placed on the 2″ by 4″ pieces, thus making a scaffold.

[fol. 62] IV

On January 26, 1953, Jennings and Sisney arrived at the location of the racks about 8:00 a. m. and built a fire for the heating of their paint. Carroll arrived about 8:30 and assisted in the preparatory work.

On the same morning, Mr. C. C. Hargis, defendant's superintendent, along with two of defendant's employees, H. D. Crosby and David York, loaded some scrap lumber in a pickup truck and proceeded to the location of the racks. The rails supporting the racks belonged to the United States Government, and, upon its request for the rails, the defendant's employees found it necessary to remove said rails. This was the first time since the racks were set up in November that defendant's employees did any work in or about the said racks. Upon arrival at the racks about 8:30 a. m., defendant's employees unloaded the scrap lumber south of the racks and then began experimenting in an effort to ascertain a suitable method of removing the rails.

They secured a 4" by 6" fir pry pole about 12 feet long and, using a block for leverage, attempted to pry up the west end of the first rack on the south end of the ten rack row. However, they discovered that it would take more men to handle the job, and they spent their time carrying cross ties and "cribbing" (small pieces of scrap lumber) while waiting for more [healp] to arrive. About 9:00 a. m., Mr. Doyne Hurst, defendant's foreman in charge of the placing of the racks, and three other employees of defendant arrived at the racks to perform the work of removing the rails. Someone had removed most, if not all, of the spreader braces from their proper places. Mr. Hurst noticed this, but he did not have them replaced, apparently because he did not think they were necessary or important.

The operation of removing the rails was performed as follows:

[fol. 63] A 7" by 9" or a 6" cross tie, about 8 feet long, would be placed under the racks, parallel to the rails and just inside the rail nearest the end of the rack to be raised. This cross tie could be placed without raising the racks. Then two men would use the pry pole and raise one end of the rack while Mr. Hurst placed enough cribbing on top of the cross tie to hold the rack, when the pry pole was removed, above the rail sufficiently to permit the removal thereof. They did not use a level to ascertain whether the racks, after the rails were removed, were still level when resting on the cross ties and cribbing. Since the aisle between the two sets of racks was only four feet wide, it was

necessary for the men operating the pry pole to stand between the racks in the eight rack row while raising the east end of the racks in the ten rack row. The racks in the two rows were not even with each other, and thus the pry bar was not always exactly parallel to the rack being raised.

The ground on which the racks were placed was filled dirt and was wet and soft at this time.

Defendant's employees begun work on the west end of the rack on the south end of the ten rack row and proceeded to raise and block the west ends of all the racks in the ten rack row. They next raised and blocked the east ends of said racks in the ten rack row. After completing the work on the ten rack row, they began work on the eight rack row, starting with the west end of the rack on the north end of the said eight rack row. At the time of the accident they were working on the west end of the third, fourth or fifth rack from the south.

In the meantime, Carroll, Jennings and Sisney, being unable to commence painting because of the moisture on the racks, went to get coffee at a place about one and one-half miles from the racks. They returned about 10:30 while defendant's employees were raising the ten rack row and [fol. 64] began painting the racks in the eight rack row. Carroll stayed on the ground and painted the lower portion of the racks while Jennings and Sisney worked on the scaffold painting the upper portion of the racks. They began at the south end and at the time of the accident, Carroll was painting the lower part of the north side of the third rack from the south. Jennings and Sisney were on the scaffold between the fourth and fifth racks, numbering from the south. Jennings was painting the south side of the fifth rack and Sisney was painting the north side of the fourth rack.

At about 11:30 a. m. on January 26, 1953, the southwest guy wire on the eight rack row broke and all eight racks fell toward the north, which was the side on which the fins protruded. Defendant's employees were working on the said row at the time the racks fell, but the pry bar was not

being used at that exact time. When the racks fell, Carroll attempted to get free but his left forearm was caught between the second and third racks. Sisney was thrown clear of the racks, but Jennings was caught between the fourth and fifth racks.

V.

The plaintiffs, Carroll, Jennings and Sisney, knew that defendant's employees were working on the ten rack row, and knew generally the nature of the work they were doing. However, none of defendant's employees notified the said plaintiffs that they had begun work on the eight rack row, apparently because, as Mr. Hurst testified, "They had a foreman there," referring to Carroll. There is no direct testimony that any of plaintiffs knew that defendant's employees had begun to raise the eight rack row and to remove the iron rails and to substitute therefor cross ties and cribbing as a foundation for the eight racks to rest upon. There was proof of some circumstances that tended to show [fol. 65] plaintiffs saw the defendants employees at work on the eight rack row but all of the plaintiffs testified that they did not know that the employees of defendant had moved over to the eight rack row where plaintiffs were busily engaged in painting which required their full and complete attention. When all the facts and circumstances are considered, the court is convinced that the plaintiffs did not know that the defendant's employees were raising the eight rack row and substituting cross ties and cribbing for the railroad rails foundation.

VI.

As heretofore stated, Carroll's forearm was caught between two racks, and he was held there for about half an hour before they could extricate him. He was then taken to Mountain Home, Arkansas, and from there to Saint John's Hospital in Springfield, Missouri. At the time of entry in the hospital he was suffering from partial shock, pain in his arm, shoulder, back and chest, and a fracture of both bones of his left forearm. It was a crushing type of injury, and x-rays revealed that he had a comminuted fracture of his forearm, but his chest, back and shoulder were not fractured. He suffered intense pain during the trip to the [jospital], and it was necessary to give him narcotics

to relieve the pain. The following morning, January 27, 1953, an operation was performed on the radius bone of his left forearm. A plate approximately 2½ inches long, ⅜ of an inch wide, and 1/16 of an inch thick was attached to the radius by means of two screws in each piece of the fractured bone. About ten or twelve days later a similar operation was performed on the ulna bone of the left forearm. While he was in the hospital, a period of about two months, and for several weeks thereafter he was required to have physical therapy every day, and necessarily suffered a great deal of pain during these treatments. Following his first operation he had some urinary trouble, and [fol. 66] following his second operation he had a lung infection similar to pneumonitis. His arm remained in a plaster cast from the time of entry in the hospital until May, 1953.

He suffered a sprained shoulder with some limitation of motion and a contusion of his back with some low back strain.

At the present time Carroll has had a satisfactory recovery from all his injuries except the fractured forearm. There is some limitation of motion of the left wrist and hand and a considerable amount of atrophy. X-rays disclose that he has not produced sufficient bone around the fracture of the radius, and, upon his doctor's advice, he intends to have another operation to remedy this situation. The new operation will require the removal of approximately a ¾-inch cube from his pelvic bone to be placed in or on the fractured part of the radius. He will have to stay in the hospital from three to six weeks and cannot work for at least six months.

If Carroll has another operation, he will still have approximately twenty per cent permanent disability of his left arm as a whole. If he does not have the operation, he will have a permanent disability of his left arm in the amount of approximately thirty-five per cent. However, this disability will decrease some as the [finction] of the arm improves.

Carroll is 53 years old and at the time of the accident he was earning $125 to $130 per week, plus expense money. During the last ten years his wages have averaged ap-

proximately $5,000 per year. Since the accident he has not been able to work as a painter and will not be able to do such work for several months.

As a result of the accident Carroll has incurred doctor and hospital bills in the sum of $1,403.05 and will incur further doctor and hospital expenses when the new operation is performed. (Doctor William H. Snead, Carroll's [fol. 67] physician, stated that his fee for the new operation would be $250.)

VII.

Jennings was caught bodily between two racks and remained there about thirty minutes before he was extricated.

Two days later, January 28, 1953, Jennings reported to the Saint John's Hospital in Springfield, Missouri. At that time he had pain in his back, chest and in the pubic symphysis region. X-rays revealed that he had a linear fracture of the right pubic ramus, without displacement. He had no fracture in his back or chest, but did have a low back strain.

He remained in bed and in traction for four and one-half weeks. His injury was painful for four or five days and he was uncomfortable while in traction. While in the hospital he was given several narcotic injections to ease his pain.

His recovery was good and he was released from treatment on April 10, 1953. However, he does have a slight permanent disability in his low back, and he still suffers some pain in his back when he sits in one position for a long time, such as when driving an automobile.

Jennings is 19 years of age and at the time of the accident was earning $44 per week. He was not able to do any heavy work for about three months after the accident.

As a result of the accident Jennings has incurred medical expenses in the sum of $597/80.

VIII.

On the day of the accident Sisney was taken to Saint John's Hospital in Springfield, Missouri, in a state of severe shock. X-rays revealed that he had a severe frac-

ture of the pelvis on both sides, fracture of the sacrum, and fracture of the greater trochanter. He suffered intense pain as a result of these fractures, as well as the treatment thereof, but at the present time he has enjoyed a satisfac- [fol. 68] tory recovery from his orthopedic injuries, although he does have some loss of motion of the low back. Insofar as these injuries are concerned, he was released for work as of September 1, 1953.

However, the most serious injury Sisney sustained was the injury to his urinary tract. He suffered a ruptured urethra and was in a very grave condition after the accident. It was necessary to operate, and at one time he was pulseless and his blood pressure could not be registered. The next day his condition improved some and he was given narcotics to relieve his pain. As a result of blood transfusions he experienced a liver disorder accompanied by fever, nausea and inability to eat food.

Sisney remained in bed for six weeks and had to keep a catheter in his bladder for eight weeks. The operation had been performed while he was in a critical condition, and as a result of the operation he had a false passage from the urethra. However, he was able to void a good stream through the false passage, and on March 24, 1953, he was released from the hospital. On March 30, 1953, he was readmitted because he had difficulty voiding, and on March 31 he received urethral dilation. On April 10 he was again admitted to the hospital with the same difficulty and on April 14 another operation was performed in order to discard the false passage. He was dismissed on May 2, but returned on May 9, with discomfort due to infection. He was dismissed May 16 and readmitted on May 20 with the same trouble. He was dismissed on June 3, making a total of five admissions to the hospital. Since his last dismissal from the hospital, he has been dilated by a doctor every two weeks. This treatment consists of passing a hollow tube through his penis into his bladder and helps him to void more freely. It will be necessary for him to have the treatments the rest of his life, but the intervals will gradually lengthen and if his improvement is good he may not have to be treated more than once or twice a year. These treatments, of course, are painful and unpleasant.

Prior to the accident Sisney was able bodied and mentally alert, but he has suffered profound emotional distress [fol. 69] as a result of his injuries, and has lost about 25 pounds in weight. He has been impotent since the occurrence of the injuries, but this condition is probably aggravated by his mental condition and may be overcome in due time. His permanent disability is approximately ten per cent.

Sisney is 35 years of age and at the time of the accident was earning $1.95 per hour. In 1952 he earned $3,800. He has not been able to work since the accident, but should be able to work within a period of four to six months if his recovery is normal.

As a result of the accident Sisney has incurred medical expenses in the sum of $4,546.50, and he will be required to expend money for medical attention in the future for dilation treatments.

Discussion.

It is necessary to consider the motion of defendant attacking the jurisdiction of the Court in the Carroll case before proceeding to a discussion of the merits of any of the cases.

The defendant contends that Carroll has elected to accept compensation payments under the Missouri Workmen's Compensation Law and is therefore precluded, by the Missouri law, from the maintenance of this common law suit. Carroll, on the other hand, contends that he has elected to accept compensation under the Arkansas Workmen's Compensation Law, rather than the Missouri Act, and that under the Arkansas law he is entitled to maintain this action against the defendant as a third party.

At the out set it may be stated that two principles of law are firmly established. Under the Missouri law, an employee of a subcontractor cannot sue the general contractor as a third party and at the same time collect compensation from his immediate employer—when the injury is within [fol. 70] the Missouri Workmen's Compensation Act. Bunner vs. Patti, et al., 343 No. 274, 121 S. W. 2d 153; New Amsterdam Casualty Co. vs. Boaz-Kiel Const. Co., 8 Cir., 115 F. 2d 950. Conversely, under the Arkansas law an employee of a subcontractor can sue the general contractor

as a third party and at the same time collect compensation from his immediate employer under the Arkansas Workmen's Compensation Act. Anderson, et al. vs. Sanderson & Porter et al., 8 Cir., 146 F. 2d 58.

Thus, the real question presented for determination is whether the right of Carroll to maintain the instant common law suit is controlled and determined by the Arkansas Workmen's Compensation Act and the Arkansas law, or by the Missouri Workmen's Compensation Act and the Missouri law.

Carroll is a citizen and resident of Missouri and the contract of employment was entered into in that state. Under the Missouri Workmen's Compensation Law, employers and employees are conclusively presumed to have elected to accept the provisions of the Act unless prior to the accident they file with the Commission written notice of election to reject the Act. Section 3300, Mo. St. Ann; Hope vs. Barnes Hospital, No. 55 S. W. 2d 319; Walker vs. Sheffield Steel Corp., Mo., 27 S. W. 2d 44. And the Missouri Act applies to injuries received outside the state under a contract of employment made in the state. Section 3310, Mo. St. Ann.; Hungate vs. Hudson, et al., Mo., 168 S. W. 2d 682. Therefore, Carroll undoubtedly was covered by the Missouri Workmen's Compensation Law at the time of his injury.

Since Carroll was covered by the Missouri Act, and under said Act could not maintain the present suit against the defendant, the question arises as to whether the Full Faith and Credit Clause of the United States Constitution requires the State of Arkansas, and this Court, to apply the bar thus [fol. 71] erected by the Missouri Act and prohibit the prosecution of the present suit by Carroll against the defendant.

If the decision of the Supreme Court in the case of Bradford Electric Light Company, Inc. vs. Clapper, Admrx., 286 U. S. 145, 52 S. Ct. 571, 76 L. Ed. 1026, were the last pronouncement of the Court on the question, there is little doubt but that the Full Faith and Credit Clause would require the application of the Missouri bar, because the facts in that case were substantially the same as the facts in this case. However, over a period of years the holding and

rationale of the Clapper case have been so modified by later decisions of the Supreme Court that the extent and force of the opinion is, to say the least, doubtful.

In Pacific Employers Insurance Co. vs. Industrial Accident Commission, et al., 306 U. S. 493, 59 S. Ct. 629, 83 L. Ed. 940, a Massachusetts employee of a Massachusetts employer was injured while working in California. The Court, in holding that California could apply its own Workmen's Compensation Act, made the following observation concerning the Clapper case at page 504 of 306 U. S.:

"The Clapper case cannot be said to have decided more than that a state statute applicable to employer and employee within the state, which by its terms provides compensation for the employee if he is injured in the course of his employment while temporarily in another state, will be given full faith and credit in the latter when not obnoxious to its policy."

At page 503 of 306 U. S. the Court said:

"Few matters could be deemed more appropriately the concern of the state in which the injury occurs or more completely within its power."

See also, Alaska Packers Ass'n vs. Industrial Accident Commission of California, et al., 294 U. S. 532, 55 S. Ct. 518, 79 L. Ed. 1044.

The rule now seems to be that any state having a substantial connection with the employee-employer relationship [fol. 72] may apply its own Workmen's Compensation Act. Cardillo vs. Liberty Mutual Insurance Co., et al., 330 U. S. 469, 476, 67 S. Ct. 801, 91 L. Ed. 1028. See also, Industrial Commission of Wisconsin, et al. vs. McCartin, et al., 330 U. S. 622, 67 S. Ct. 886, 91 L. Ed. 1140. (Permitting recovery under both the Illinois and the Wisconsin Acts). And, a state having the right to apply its own Workmen's Compensation Act would also have the right to apply its own third party practice. See, Vol. 2, Larson's Workmen's Compensation Law, Section 88.23, Page 407.

In the instant case, the accident occurred in Arkansas and this State may apply its own Workmen's Compensation Law and its own third party procedure. Especially is this

true in view of the established public policy in Arkansas favoring the common law right of action for injuries to persons and property. Amendment 26 to the Constitution of the State of Arkansas adopted in 1938 amended Article 5, Section 32, to permit the enactment of a Workmen's Compensation Law, but the said Amendment provided that "otherwise no law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property * * *." In Young vs. G. L. Tarlton, Contractor, Inc., 204 Ark. 283, 162 S. W. 2d 477, the Court at page 288 of 204 Ark. said:

"The amendment provides that otherwise, that is, except in cases arising between employer and employee, no law shall be passed limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property."

In Anderson, et al. vs. Sanderson & Porter, et al., supra, the Court, after quoting from the Young case, at page 62 said:

"We think it is safe to say that an action brought against a general contractor by an employee of a subcontractor of a subcontractor is not a 'case arising between an employer and an employee' within the meaning ordinarily attributed to the words quoted."

But see, Brothers vs. Dierks Lumber & Coal Company, 217 Ark. 632, 640, 232 S. W. 2d 646.

{fol. 73} The Arkansas Supreme Court has consistently applied the law of the place of the injury in determining whether a person has a common law right of action. In cases where the injury occurred in another state, which state made recovery under its Workmen's Compensation Law exclusive, the Court enforced the bar of the other state and refused to entertain an action in this State. Magnolia Petroleum Company vs. Turner, 188 Ark. 177, 65 S. W. 2d 1; Logan vs. Missouri Valley Bridge & Iron Co., 157 Ark. 528, 249 S. W. 1. The rationale of these cases is, of course, that if there is no right of action in the state wherein the injury occurred, there is no right of action in any state. See also, Tucker vs. Texas Co., 5 Cir., 203 F. 2d

918; Bagnel vs. Springfield Sand & Tile Co., et al., 1 Cir., 144 F. 2d 65; Restatement, Conflict of Laws, 1948 Supp., Section 401. However, where the accident occurred in this State, the Court has refused to enforce the bar of the Workmen's Compensation Act of another state. Haynes Drilling Corporation vs. Smith, 200 Ark. 1098, 1106, 143 S. W. 2d 27. And, in Smith vs. Arkansas Power & Light Company, 191 Ark. 389, 395, 86 S. W. 2d 411, the Court at page 395 of 191 Ark., said:

It is true, of course, as appellant insists, that, as he was injured in this State, his right to recover compensation for those injuries and the amount thereof must be determined by the laws of this State, uninfluenced by the compensation laws of the State in which plaintiff was employed."

Therefore, it seems that the Full Faith and Credit Clause provides no obstacle to the application of the Arkansas Workmen's Compensation Law and third party practice in the instant case.

Of course, even though a state is not required to do so, it may, as a matter of comity, enforce the bar erected by the Workmen's Compensation Law of the state where the contract of employment was made. See, Ohlhaver vs. Narron, 4 Cir., 195 F. 2d 676. But, the Court feels that the public [fol. 74] policy of Arkansas favoring common law actions for damages to persons and property, and favoring the application of the law of the place of the injury, precludes the application of the bar of the Missouri Act in this case.

While it is true that Carroll, as a matter of Missouri law "elected" to come within the coverage of the Missouri Act by failing to reject the Act prior to the accident, that does not preclude him from "electing" to receive his compensation payments under the Arkansas Act. Insofar as his election between the two Acts is concerned, it is clear that Carroll has elected to receive his compensation payments under the Arkansas Act. At the time he was receiving payments under the Missouri Act he did not know that he had the right to receive payments under the Arkansas Act, nor did he know that the payments were, in fact, being made under the Missouri Act.

In City National Bank vs. McCann, 193 Ark. 967, 980, 106 S. W. 2d 195, the Court at page 980 of 193 Ark., said:

"Therefore, the case of Craig vs. Meriwether, 84 Ark. 298, 105 S. W. 585, cited by plaintiffs, is controlling. 'The binding force of an election cannot be predicated upon mere imputed knowledge, for the doctrine is based entirely upon the idea of a conscious exercise of choice between two remedies which are inconsistent with each other. In order that a person who is put to his election should be concluded by it, two things are necessary: first, a full knowledge of the nature of the inconsistent rights, and of the necessity of electing between them; second, an intention to elect, manifested either expressly or by acts which imply choice and acquiescence.' "

See also, Haynes Drilling Corporation vs. Smith, supra, at pages 1106-1107; 8 A.L.R. 2d 628-629; 28 C. J. S., Election of Remedies, Section 23, Page 1097.

It was not until October 10, 1953, that Carroll exercised a conscious choice between two inconsistent remedies, and it was not until then that he made an election as to which Act he desired to govern his compensation payments. His [fol. 75] decision was to accept such payments under the Arkansas Act, and the Arkansas Workmen's Compensation Commission accepted the filing of his claim.

The accident occurred in Arkansas, and it would seem that by virtue of Sections 81-1302 and 81-1303, Arkansas Statutes 1947, Annotated (1951 Supp.), Carroll's claim may be granted under the Arkansas Act. And, since he is receiving compensation under the Arkansas Act, he is also entitled to the benefit of its third party rule permitting an employee of a subcontractor to prosecute a suit against the general contractor. Therefore, the Court has jurisdiction of the action brought by Carroll against the defendant herein, and defendant's motion for judgment should be denied.

On the merits of the cases, three questions are presented. (1) Was the defendant guilty of negligence which was a proximate cause of the plaintiffs' injuries? (2) If the defendant was guilty of such negligence, were the plaintiffs guilty of contributory negligence, thus precluding the recov-

ery of damages by them? (3) Did plaintiffs assume the risk of their employment, likewise precluding the recovery of damages by them?

Of course, since the accident occurred in Arkansas, the law of this State governs the substantive rights of the parties. The burden of proof is upon plaintiffs to prove by a preponderance of the evidence that the defendant's employees were guilty of negligence, and that such negligence was the proximate cause of the injuries received by the plaintiffs. Roark Transportation, Inc. vs. Sneed, 188 Ark. 928, 68 S. W. 2d 996.

Negligence is the failure to do that which a person of ordinary care and prudence would do under the same or similar circumstances, or the doing of something which a [fol. 76] person of ordinary care and prudence would not have done under the same or similar circumstances. St. Louis-San Francisco Ry. Co. vs. Ward, 197 Ark. 520, 524, 124 S. W. 2d 975; Self vs. Kirkpatrick, 194 Ark. 1014, 1022, 110 S. W. 2d 13.

Negligence is the proximate cause of an injury only if the injury is the natural and probable consequence of the negligent act and ought to have been foreseen in the light of attending circumstances. Ozark Packing Co. vs. Stanley, 211 Ark. 749, 202 S. W. 2d 352; Hook, Administrator vs. Reynolds, 203 Ark. 259, 261, 156 S. W. 2d 242.

A general contractor in control of premises upon which work is being done has a duty to exercise ordinary care to furnish to the employees of his subcontractor a reasonably safe place to work. In Aluminum Ore Company vs. George, 208 Ark. 419, 186 S. W. 2d 656, the Court at page 424 of 208 Ark. quoted with approval from 35 Am. Jur., page 590, the following:

"In amplification of this rule it may be said that where any person is brought upon premises belonging to the individual charged with negligence, there is a duty to inform the person who is brought upon the premises of anything in the nature of a trap from which he may suffer. The principal employer has been said to be bound in law to use reasonable care and caution to provide and maintain a safe

place in which the servants of the independent contractor can work, although not bound absolutely to provide and maintain such a place; the duty is fulfilled if reasonable care is used to protect the plaintiff from injury, in supplying and maintaining a safe place . . ."

In Smith vs. Henger, 148 Tex. 456, 226 S. W. 2d 425, 20 A.L.R. 2d 853, the court at page 863 of 20 A.L.R. 2d said:

"The law places upon the owner or occupant of land the duty to use reasonable care to make and keep the premises safe for the use of persons invited to use the premises for business purposes * * *. Included within the class of persons to whom this duty is owed are the employees of contractors performing construction or other work on the premises. * * * When the owner puts some other person in control of the premises or a part of them, such person likewise has the duty to keep the premises under his control [fol. 77] in safe condition. * * * A general contractor on a construction job, who is in control of the premises, is burdened with the duty to use due care to provide a safe place for workmen on the premises, including the employees of other contractors, * * *.

Where the duty to keep premises in a safe condition is imposed on a person in control of them, this duty may include the duty to inspect the premises to discover dangerous conditions * * * or to warn such persons of the existence of dangers which could not reasonably be expected to be apparent or obvious * * *. The standard by which this duty is measured is that of reasonable care, and whether the duty has been properly discharged depends on the facts of each case."

See also, 20 A.L.R. 2d 868-918; Restatement, Torts, Sections 343 and 387; Kuptz et al. v. Ralph Sollitt & Sons Const. Co., 5 Cir., 88 F. 2d 532, 534.

When a general contractor and a subcontractor are working on the same premises, it is the duty of each contractor to use ordinary care not to injure the employees of the other contrateor. 557 C.J.S., Master and Servant, Section 610, Page 381. See also, Sinclair Prairie Oil Co. v. Thornley, 10 Cir., 127 F.2d 128.

Applying the above rules of law to the facts in the instant case, it is apparent that the defendant's employees were guilty of negligence which was the proximate cause of the injuries received by plaintiffs. Not only did they begin working on the row of racks where plaintiffs were painting without warning them, but they also (1) raised the racks, thus exerting more pressure on the supporting wires which were already taut; (2) replaced the racks without ascertaining that they were level; (3) replaced said racks on scrap ties and cribbing set on soft wet ground, which would necessarily cause some settling of the racks; and (4) operated the pry bar, at least part of the time, at an angle, thus increasing the possibility of replacing the racks in an unbalanced position. None of these acts were the acts of ordinary prudent persons, and certainly when the acts are [fol. 78] considered collectively, there is no doubt but that the activities of defendant's employees caused the racks to fall and that said employees were guilty of negligence. In other words, the defendant, acting through his employees, neither furnished plaintiffs with a reasonably safe place to work, nor did he exercise ordinary care to avoid injuring the plaintiffs, who were employees of his subcontractor.

This brings the Court to the question, were plaintiffs guilty of contributory negligence or assuption of risk.

Both contributory negligence and assumption of risk are affirmative defenses, and the burden is upon the defendant to prove by a preponderance of the evidence such contributory negligence or assumption of risk on the part of the plaintiffs, unless the proof introduced by the plaintiffs establishes that they were guilty of contributory negligence. Chapman v. Henderson, 188 Ark. 714, 720, 67 S.W. 2d 570; Covington v. Little Fay Oil Company, 178 Ark. 1046, 1051, 13 S.W. 2d 306; Sun Oil Company v. Hedge, 173 Ark. 729, 740, 293 S.W. 9.

Contributory negligence is the doing of something by the plaintiffs which a person exercising ordinary care and prudence would not have done under the same or similar circumstances, or the failure of the plaintiffs to do something which a person exercising ordinary care and prudence would have done under the same or similar circumstances, and which conduct on the part of the plaintiffs contributed,

however slightly, in whole or in part, to the occurrence and injuries, and without which the occurrence and injuries would not have occurred. Kirby v. Swift & Co., 199 Ark. 442, 446, 134 S.W. 2d 865; Kittrell v. Wilkerson, 177 Ark. 1174, 9 S.W. 2d 788; Russ v. Strickland, 130 Ark. 406, 197 S.W. 769.

An employee assumes all the ordinary risks and hazards incident to his employment, and when his knowledge concerning his employment exceeds that of his employer, the [fol. 79] employer is not liable to him for injuries sustained as a result of said employment. Benedum-Trees Oil Company vs. Sutton, 198 Ark. 699, 130 S. W. 2d 720; Arkansas Western Gas. Co. vs. Bragg, 194 Ark. 402, 404, 107 S. W. 2d 528.

In M. E. Gillioz v. Lancaster, 195 Ark. 688, 698, 113 S.W. 2d 709, the Court at page 698 of 195 Ark. said:

"Of course, this court has always held that where the danger arising from an employment is so apparent and obvious in its nature as to be at once discoverable to one of ordinary intelligence, an employee, by voluntarily undertaking to perform his work in such a situation, assumes the hazards which exempts the employer from liability on account of injury to the employee."

See also, Long Bell Lumber Co. v. Tarver, 169 Ark. 275, 273 S.W. 718.

However, an employee does not assume the risk of a hazard caused by the master's negligence, and the employee may rely upon the master's judgment unless the danger is so obvious that no prudent man would incur it under like circumstances. Haymes Drilling Corporation v. Smith, 200 Ark. 1098, 143 S.W. 2d 27; Carson v. Dierks Lumber & Coal Company, 196 Ark. 163, 170, 117 S.W. 2d 39; Federal Compress & Warehouse Company v. Harmon, 196 Ark. 417, 432, 118 S.W. 2d 239.

The doctrine of assumed risk is based upon voluntary exposure to a known danger. Chicago, Rock Island & Pacific Railway Company v. Lewis, 103 Ark. 99, 104, 145 S.W. 898. The defense of assumed risk will be applied in cases fairly

within the rule, but it is not a favored doctrine, being artificial and harsh, and should not be extended beyond its reasonable limits. Bradley Lumber Company of Arkansas v. Clanton, 201 Ark. 657, 660, 147 S.W. 2s 14; Goodin, Adm'x v. Boyd-Sicard Coal Company, 197 Ark. 175, 180, 122 S.W. 2d 548; Federal Compress & Warehouse Company v. Harmon, supra, at page 432 of 196 Ark.

[fol. 80] Even though an employee knows of his master's negligence, nevertheless he does not assume the risk of the increased hazard unless he actually realizes the danger to which he is exposed. Federal Compress & Warehouse Company v. Harmon, supra, at page 433 of 196 Ark. In other words, an appreciation of the danger is a prerequisite to the application of the doctrine. Goodin, Adm'x v. Boyd-Sicard Coal Company, supra, at page 181 of 197 Ark.

There is some doubt as to whether the doctrine of assumption of risk applies between a general contractor and the employees of his subcontractor. However, the Arkansas Supreme Court has applied the doctrine in actions by employees of shippers against railroad ecmpanies for injuries sustained while unloading box cars, owned by said railroad companies, as a result of the unsafe condition of the box cars. The Chicago, Rock Island & Pacific Railway Company v. Sampson, 200 Ark. 906, 910, 142 S. W. 2d 221; St. Louis & San Francisco Railroad Company v. Fritts, 85 Ark. 460, 108 S. W. 841. See, also, Aluminum Ore Co. v. George, supra. And, the Court is of the opinion that the Arkansas Supreme Court would likewise apply the doctrine in the case of an action by an employee of a subcontractor agains the general contractor.

When the above rules of law are applied to the facts herein, the Court feels that the plaintiffs were neither guilty of contributory negligence nor assumed risk.

The defendant contends that the plaintiffs knew the work of re-blocking the racks was being performed on the eight rack row and that plaintiffs assumed the risk of their employment after having such knowledge. However, the Court has concluded that plaintiffs did not know defendant's employees were working on the eight rack row. (Finding of fact No. V) In making this determination, the Court

considered several factors. (1) The plaintiffs each denied [fol. 81] knowing that defendant's employees were working on the eight rack row. (2) None of defendant's employees advised plaintiffs of the fact that work had begun on said racks. (3) In working on the ten rack row defendant's employees had been in and out of the eight rack row, operating the pry pole, etc., and when they began working on the eight rack row, the plaintiffs, being busily engaged in their own work, evidently paid little attention to defendant's employees and assumed that they were still working on the ten rack row. It is true that the defendant introduced evidence which, if believed, would tend to show that some or all of the plaintiffs might have known the work was being done on the eight rack row, but, when all the evidence is considered, the Court is of the opinion that plaintiffs did not know defendant's employees were working on said eight rack row, and that defendant has failed to prove by a preponderance of the evidence that plaintiffs were guilty of contributory negligence or assumed risk.

Since plaintiffs did not know that defendant's employees were working on the eight rack row, they did not know or appreciate the danger involved, and, of course, did not assume the risk which was unknown to them. Likewise, they were not guilty of contributory negligence.

Even if plaintiffs had known that defendant's employees were working on the eight rack row, the doctrine of assumed risk would not prevent their recovery in this case.

In Chicago, Rock Island & Pacific Railway Company v. Lewis, 103 Ark. 99, 104, 145 S. W. 898, the Court said:

"The doctrine of assumed risks is based upon voluntary exposure to a known danger * * * and can only be applied in cases where the person may reasonably elect whether or not he shall expose himself to it. The exposure may be without physical coercion, yet the circumstances may be such as would render it unreasonable for a person to exer- [fol. 82] cise his election not to proceed in that way. Therefore, if it be conceded that the plaintiff, with notice of the defect in the car before he began to unload it, as-

sumed the risk, as a matter of law, by proceeding with the work, yet such is not the state of facts in this case. If he had such notice before he commenced unloading the car, it might be deemed reasonable to hold him to an election, either to refuse to accept the delivery of the goods from the defective car or to take the risk himself of unloading it if he preferred to do so while it was in that condition; but it would not be fair to apply that rule after he had proceeded with his work, unconscious of the defect, and discovered it while in the midst of his work of unloading. He was not bound, under these circumstances, to cease working because of a known defect, which it can not be said was so dangerous that a prudent man would not proceed. He was not bound to break up his task in that way and to unload the car by piecemeal; and because he proceeded, under those circumstances, to complete his task, it can not be said that he assumed the risk. In other words, it is not reasonable to expect him, in that state of the progress of his work, to decline to proceed further, unless the danger was so obvious that it was negligence to proceed, and it therefore can not be said that self-exposure to the danger under those circumstances was voluntary in the sense that he must be deemed in law to have accepted the risk."

In Goodin, Adm'x v. Boyd-Sicard Coal Company, supra, the Court at page 181 of 197 Ark. quoted with approval the following statement from R. C. L.:

"Although an employee may have had knowledge, as of a physical fact, of the defective condition of a tool, appliance or place, by reason of which he has sustained an injury, it by no means follows that he must have appreciated the danger to which he was exposed. His general knowledge may not have been such as to give him any conception of the peril. The condition may have appeared perfectly harmless. If this is shown to have been the case, his right of recovery is not defeated, for it is an appreciation of the danger, not mere knowledge of the defect by which the danger is threatened, that bars his action."

In the instant case the plaintiffs were already painting on the eight rack row at the time defendant's employees began working on said row. Therefore, even if plaintiffs knew that defendant's employees were working on said row, it

would not be reasonable to expect them to stop their work unless the danger was so obvious that it was negligence to proceed. The Court does not believe that such danger [fol. 83] would have been apparent to plaintiffs. They had the right to assume that defendant's employees were using a reasonably safe method of removing the rails. Moreover, if they knew work was being performed on the eight rack row, they also knew that the work had been completed on the ten rack row, and since the ten rack row was still standing plaintiffs might reasonably have assumed that defendant's employees were using a safe method of removing the rails and that there was no danger of the eight rack row falling as a result of the work.

The defendant's foreman in charge of the crew that was removing the rails was the same foreman who set the racks on the rails for painting in November, 1952, and, of course, he realized the danger involved in handling the racks since he was advised of their weight and construction and of the necessity of keeping them on a level and solid foundation with proper braces to prevent them from falling. The plaintiffs, on the other hand, were painters and were busily engaged in their work. They had no experience in the placing or handling of such racks and were not present when the racks were placed in position in November, 1952, by defendant's employees. Therefore, plaintiffs would have been justified in believing that defendant's employees were using a reasonably safe method of removing the rails and that there was no danger of the racks being overturned or caused to fall because of the activities of defendant's employees.

Therefore, even if plaintiffs knew of the work being done on the eight rack row, they were not guilty of assumed risk or contributory negligence, and, since defendant was guilty of negligence which was the proximate cause of the injuries to plaintiffs, they are entitled to recover damages therefor.

The rule of damages applicable to personal injuries is stated in Coca-Cola Bottling Co. of Arkansas v. Adcox, 189 Ark. 610, 613, 74 S. W. 2d 771, 772, as follows:

[fol. 84] "The measure of damages for a physical injury to the person may be broadly stated to be such sum, so far

as it is susceptible of estimate in money, as will compensate plaintiff for all losses, subject to the limitations imposed by the doctrines of natural and proximate consequences, and of certainty, which he has sustained by reason of the injury, including compensation for his pain and suffering, for his loss of time, for medical attendance and support during the period of his disablement, and for such permanent injury and continuing disability as he had sustained. Plaintiff is not limited in his recovery to specific pecuniary losses as to which there is direct proof, and it is obvious that certain of the results of a personal injury are unsusceptible of pecuniary admeasurement."

See also Hot . ings Street Railway Company v. Hill, 198 Ark. 319, 12 S. W. 2d 369; St. Louis-San Francisco Railway Co. v. Herndon, 198 Ark. 465, 129 S. W. 2d 954.

Conclusions of Law.

I.

The Court has jurisdiction of the parties to and the subject matter of these three causes of action.

II.

The defendant, acting through his employees, was guilty of negligence which was the proximate cause of the injuries received by the plaintiffs.

III.

The plaintiffs were not guilty of contributory negligence or assumed risk.

IV.

In Civil Action 352, the plaintiff, Virgil G. Carroll, is entitled to recover of and from the defendant, M. Lanza, d/b/a Lake Charles Electric Company, the sum of $18,000. The plaintiffs and intervenors, Harry B. Hogan, d/b/a Harry B. Hogan Painting Company, and Saint Paul-Mercury Indemnity Company, are entitled to a first lien upon two thirds of the net proceeds recovered herein that remain after the payment of the reasonable costs of collection, for the payment to them of the amount paid and to be paid by them as compensation to the plaintiff, Virgil G. Carroll.

[fol. 85]

V.

In Civil Action 353, O. E. Jennings, as next friend of the plaintiff, Paul A. Jennings, is entitled to recover of and from the defendant, M. Lanza, d/b/a Lake Charles Electric Company, the sum of $6,000, for the use and benefit of the said plaintiff, Paul A. Jennings, a Minor. The plaintiffs and intervenors, Harry B. Hogan, d/b/a Harry B. Hogan Painting Company, and Saint Paul-Mercury Indemnity Company, are entitled to a first lien upon two thirds of the net proceeds recovered herein that remain after the payment of the reasonable costs of collection, for the payment to them of the amount paid and to be paid by them as compensation to the plaintiff, Paul A. Jennings.

VI.

In Civil Action 356, the plaintiffs, Saint Paul-Mercury Indemnity Company, Harry B. Hogan, d/b/a Harry B. Hogan Painting Company, and Lonnie Sisney, are entitled to recover of and from the defendant, M. Lanza, d/b/a Lake Charles Electric Company, the sum of $22,500. As between the various plaintiffs, the plaintiff, Lonnie Sisney, is entitled to any amount recovered herein over and above the amount that the plaintiffs, Harry B. Hogan and Saint Paul-Mercury Indemnity Company, have paid or are liable for in compensation, after deducting reasonable costs of collection, and in no event shall the plaintiff, Lonnie Sisney, be entitled to less than one-third of the amount herein recovered, after deducting the reasonable cost of collection.

A judgment in accordance with the above should be entered.

This 13 day of November, 1953.

JNO. E. MILLER,
United States District Judge

[fol. 86] (Judgment in Carroll Case, Civil No. 352)

(Filed in U. S. District Court on November 13, 1953)

In the United States District Court
Western District of Arkansas, Harrison Division

Virgil G. Carroll, Plaintiff,

No. 352 vs. Civil Action

M. Lanza, d/b/a Lake Charles Elec. Co., Defendant,

Harry B. Hogan, d/b/a Harry B. Hogan Painting Company and St. Paul-Mercury Indemnity Company, Intervenors.

This cause was tried to the court at Fort Smith, Arkansas, on November 5th and 6th, 1953, as consolidated with Civil Actions 353 and 356 for the purpose of trial, the plaintiff and intervenors appearing by Messrs. Goodwin & Riffel and Allen, Woolsey & Fisher, their attorneys, and the defendant appearing by Messrs. Wright, Harrison, Lindsey & Upton and Shaw, Jones & Shaw, his attorneys. Evidence was presented on behalf of the respective parties, and at the conclusion thereof counsel made oral arguments in support of the respective contentions, and the case was submitted and taken under advisement by the court.

The court, having duly considered this cause, has now prepared and filed herein its findings of fact and conclusions of law, separately stated, and in accordance therewith.

It Is Ordered And Adjudged that the plaintiff, Virgil G. Carroll, have and recover of and from the defendant, M. Lanza, doing business as Lake Charles Electric Company, the sum of $18,000.00, together with his costs herein expended.

It Is Further Ordered And Adjudged that the plaintiff [fol. 87] and intervenors, Harry B. Hogan, doing business as Harry B. Hogan Painting Company, and Saint Paul-Mercury Indemnity Company, have a first lien upon two-thirds of the net proceeds recovered herein that remain after the payment of the reasonable costs of collection, for

the payment to them of the amount paid and to be paid by them as compensation to the plaintiff, Virgil G. Carroll.

This November 13, 1953.

JNO. E. MILLER,
United States District Judge.

[fol. 88] (Judgment in Jennings Case, Civil No. 353)

(Filed in U. S. District Court on November 13, 1953)

United States District Court
Western District of Arkansas, Harrison Division

Paul A. Jennings, a Minor, by O. E. Jennings, his Next Friend, Plaintiffs,

No. 353 vs. Civil Action

M. Lanza, d/b/a Lake Charles Electric Co., Defendant,

Harry B. Hogan, d/b/a Harry B. Hogan Painting Company and Saint Paul-Mercury Indemnity Company, Intervenors.

This cause was tried to the court at Fort Smith, Arkansas, on November 5th and 6th, 1953, as consolidated with Civil Actions 352 and 356 for the purpose of trial, the plaintiff and intervenors appearing by Messrs. Goodwin & Riffel and Allen, Woolsey & Fisher, their attorneys, and the defendant appearing by Messrs. Wright, Harrison, Lindsey & Upton and Shaw, Jones & Shaw, his attorneys. Evidence was presented on behalf of the respective parties, and at the conclusion thereof counsel made oral arguments in support of the respective contentions, and the case was submitted and taken under advisement by the court.

The court, having duly considered this cause, has now prepared and filed herein its findings of fact and conclusions of law, separately stated, and in accordance therewith,

It Is Ordered And Adjudged that the plaintiff, O. E. Jennings as next friend of the plaintiff Paul A. Jennings, have and recover of and from the defendant, M. Lanza, doing business as Lake Charles Electric Company, the sum of $6,000.00, for the use and benefit of the said plaintiff, Paul

A. Jennings, a minor, together with his cost herein expended.

It Is Further Ordered And Adjudged that the plaintiffs, and intervenors Harry B. Hogan, doing business as Harry B. Hogan Painting Company, and Saint Paul-Mercury Indemnity Company have a first lien upon two-thirds of the [fol. 89] net proceeds recovered herein that remain after the payment of the reasonable costs of collection, for the payment to them of the amount paid and to be paid by them as compensation to the plaintiff, Paul A. Jennings.

This November 13, 1953.

JNO. E. MILLER,
U. S. District Judge.

[fol. 90] (Judgment in Saint Paul-Mercury Indemnity Company Case, Civil No. 356)

(Filed in U. S. District Court on November 13, 1953)

United States District Court
Western District of Arkansas, Harrison Division

Saint Paul-Mercury Indemnity Company, Harry B. Hogan, doing business as Harry B. Hogan Painting Company, and Lonnie Sisney, Plaintiffs,

No. 356 vs. Civil Action

M. Lanza, doing business as Lake Charles Electric Company, Defendant.

This cause was tried to the court at Fort Smith, Arkansas, on November 5th and 6th, 1953, as consolidated with Civil Actions 352 and 353 for the purpose of trial, the plaintiffs appearing by Messrs. Goodwin & Riffel and Allen, Woolsey & Fisher, their attorneys, and the plaintiff Lonnie Sisney appearing also by Mr. A. N. Wood, his attorney, and the defendant appearing by Messrs. Wright, Harrison, Lindsey & Upton and Shaw, Jones & Shaw, his attorneys. Evidence was presented on behalf of the respective parties, and at the conclusion thereof counsel made oral arguments in support of the respective contentions, and the case was submitted and taken under advisement by the court.

The court, having duly considered this cause, has now prepared and filed herein its findings of fact and conclusions of law, separately stated, and in accordance therewith,

It Is Ordered And Adjudged that the plaintiffs, St. Paul-Mercury Indemnity Company, Harry B. Hogan, doing business as Harry B. Hogan Painting Company, and Lonnie Sisney, have and recover of and from defendant, M. Lanza, doing business as Lake Charles Electric Company, the sum of $22,500.00, together with their costs herein expended.

It Is Further Ordered And Adjudged that as between the various plaintiffs the plaintiff Lonnie Sisney shall have any amount recovered herein over and above the amount [fol. 91] that the plaintiffs Harry B. Hogan and Saint Paul-Mercury Indemnity Company have paid or are liable for in compensation, after deducting reasonable costs of collection, and in no event shall the plaintiff Lonnie Sisney have less than one-third of the amount herein recovered of the plaintiffs, after reasonable cost of collection has been deducted.

This November 13, 1953.

JNO. E. MILLER,
U. S. District Judge.

[fol. 92] (Notice of Appeal in Carroll Case, Civil No. 352)

(Filed in U. S. District Court on December 10, 1953)

United States District Court, Western District of Arkansas, Harrison Division.

Virgil G. Carroll, Plaintiff,
No. 352. vs. Civil Action.
M. Lanza, d/b/a Lake Charles Electric Co., Defendant,
Harry B. Hogan, d/b/a Harry B. Hogan Painting Company

and

St. Paul-Mercury Indemnity Company, Interveners.

Notice is hereby given that M. Lanza, doing business as Lake Charles Electric Company, defendant above named, hereby appeals to the United States Court of Appeals for

the Eighth Circuit from the final judgment entered in this action on November 13, 1953.

Dated December 10, 1953.

WRIGHT, HARRISON, LINDSEY & UPTON,
1025 Pyramid Building,
Little Rock, Arkansas

and

SHAW, JONES & SHAW,
Merchants National Bank Building,
Fort Smith, Arkansas.
By Bruce Shaw,
Attorneys for Appellant,
M. Lanza, doing business as
Lake Charles Electric Company.

[fol. 93] (Notice of Appeal in Jennings Case, Civil No. 353)

(Filed in U. S. District Court on December 10, 1953)

United States District Court, Western District of Arkansas, Harrison Division.

Paul A. Jennings, a Minor, by O. E. Jennings, his Next Friend, Plaintiff,
No. 353. vs. Civil Action.
M. Lanza, d/b/a Lake Charles Electric Co., Defendant,

Harry B. Hogan, d/b/a Harry B. Hogan Painting Company

and

Saint Paul-Mercury Indemnity Company, Interveners.

Notice is hereby given that M. Lanza, doing business as Lake Charles Electric Company, defendant above named, hereby appeals to the United States Court of Appeals for the Eighth Circuit from the final judgment entered in this motion on November 13, 1953.

Dated December 10, 1953.

WRIGHT, HARRISON, LINDSEY & UPTON,
1025 Pyramid Building,
Little Rock, Arkansas

and

SHAW, JONES & SHAW,
Merchants National Bank Building,
Fort Smith, Arkansas.
By Bruce Shaw,
Attorneys for Appellant,
M. Lanza, doing business as
Lake Charles Electric Company.

[fol. 94] (Notice of Appeal in Saint Paul-Mercury Indemnity Company Case, Civil No. 356)

(Filed in U. S. District Court on December 10, 1953)

United States District Court, Western District of Arkansas, Harrison Division.

Saint Paul-Mercury Indemnity Company, Harry B. Hogan, doing business as Harry B. Hogan Painting Company, and Lonnie Sisney, Plaintiffs,
No. 356. vs. Civil Action.
M. Lanza, doing business as Lake Charles Electric Company, Defendant.

Notice is hereby given that M. Lanza, doing business as Lake Charles Electric Company, defendant above named, hereby appeals to the United States Court of Appeals for the Eighth Circuit from the final judgment entered in this action on November 13, 1953.

Dated December 10, 1953.

WRIGHT, HARRISON, LINDSEY & UPTON,
1025 Pyramid Building,
Little Rock, Arkansas

and

SHAW, JONES & SHAW,
Merchants National Bank Building,
Fort Smith, Arkansas.
By Bruce Shaw,
Attorneys for Appellant,
M. Lanza, doing business as
Lake Charles Electric Company.

[fol. 95] (Supersedeas Bond on Appeal in Carroll Case, Civil No. 352)

(Filed in U. S. District Court on December 17, 1953)

United States District Court, Western District of Arkansas, Harrison Division.

Virgil G. Carroll, Plaintiff,
No. 352. vs. Civil Action.
M. Lanza, d/b/a Lake Charles Electric Co., Defendant,

Harry B. Hogan, d/b/a Harry B. Hogan Painting Company and St. Paul-Mercury Indemnity Company, Interveners.

Know All Men By These Presents:

That Traders & General Insurance Co., a corporation created, organized and existing under and by virtue of the laws of the State of Texas, having its principal place of business in the City of Dallas, State of Texas, and duly authorized to carry on a general casualty insurance business within the State of Arkansas, and in the courts of the United States, is held and firmly bound unto Virgil G. Carroll, plaintiff and Harry B. Hogan, d/b/a Harry B. Hogan Painting Company and St. Paul-Mercury Indemnity Company, interveners, in the full and just sum of Twenty Thousand Dollars ($20,000.00), to be paid to the said Virgil G. Carroll and Harry B. Hogan, d/b/a Harry B. Hogan Painting

Company and St. Paul-Mercury Indemnity Company, their administrators, executors, successors, or assigns, to which payment, well and truly to be made, it binds itself, its successors and assigns firmly by these presents.

Signed and sealed this.....day of.....,
1953.

Whereas, on November 13, 1953, in an action pending in the United States District Court for the Western District of Arkansas, between the parties shown in the caption above, [fol. 96] being civil action No. 352, final judgment was rendered in favor of the plaintiff, Virgil G. Carroll, and interveners, Harry B. Hogan, d/b/a Harry B. Hogan Painting Company and St. Paul-Mercury Indemnity Company, and against M. Lanza, d/b/a Lake Charles Electric Company, as defendant, for Eighteen Thousand Dollars ($18,000.00); and the said defendant, M. Lanza, d/b/a Lake Charles Electric Company, having filed a notice of appeal from such judgment to the United States Court of Appeals for the Eighth Circuit;

Now, Therefore, the condition of this obligation is such, that if the said M. Lanza, d/b/a Lake Charles Electric Company shall prosecute his appeal to effect and shall satisfy the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, or shall satisfy in full such modification of the said judgment and such cost, interest, and damages as the said Court of Appeals may adjudge and award. then this obligation to be void; otherwise to remain in full force and effect.

.....

By.....

Approved:

....., 195..

.....

United States District Judge.

[fol. 97] (Supersedeas Bond on Appeal in Jennings Case, Civil No. 353)

(Filed in U. S. District Court on December 17, 1953)

United States District Court, Western District of Arkansas, Harrison Division.

Paul A. Jennings, A Minor, by O. E. Jennings, his Next Friend, Plaintiff,
No. 353. vs. Civil Action.
M. Lanza, d/b/a Lake Charles Electric Co., Defendant,

Harry B. Hogan, d/b/a Harry B. Hogan Painting Company and Saint Paul-Mercury Indemnity Company, Interveners.

That Traders & General Insurance Co., a corporation created, organized and existing under and by virtue of the laws of the State of Texas, having its principal place of business in the City of Dallas, State of Texas, and duly authorized to carry on a general casualty insurance business within the State of Arkansas, and in the courts of the United States, is held and firmly bound unto Paul A. Jennings, a Minor, by O. E. Jennings, his Next Friend, plaintiff and Harry B. Hogan, d/b/a Harry B. Hogan Painting Company and Saint Paul-Mercury Indemnity Company, interveners, in the full and just sum of Seven Thousand Dollars ($7,000.00), to be paid to the said Paul A. Jennings, a Minor, by O. E. Jennings, his Next Friend and Harry B. Hogan, d/b/a Harry B. Hogan Painting Company and Saint Paul-Mercury Indemnity Company, their administrators, executors, successors, or assigns, to which payment, well and truly to be made, it binds itself, its successors and assigns firmly by these presents.

Signed and sealed this.....day of....., 1953.

[fol. 98] Whereas, on November 13, 1953, in an action pending in the United States District Court for the Western District of Arkansas, between the parties shown in the caption above, being civil action No. 353, final judgment was rendered in favor of the plaintiff, Paul A. Jennings, a

Minor, by O. E. Jennings, his next friend, and intervenors, Harry B. Hogan, d/b/a Harry B. Hogan Painting Company and Saint Paul-Mercury Indemnity Company, and against M. Lanza, d/b/a Lake Charles Electric Company, as defendant, for Six Thousand Dollars ($6,000.00); and the said defendant, M. Lanza, d/b/a Lake Charles Electric Company, having filed a notice of appeal from such judgment to the United States Court of Appeals for the Eighth Circuit;

Now, Therefore, the condition of this obligation is such, that if the said M. Lanza, d/b/a Lake Charles Electric Company shall prosecute his appeal to effect and shall satisfy the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, or shall satisfy in full such modification of the said judgment and such cost, interest, and damages as the said Court of Appeals may adjudge and award, then this obligation to be void; otherwise to remain in full force and effect.

.....

By .....

Approved:

....., 19....,

.....

United States District Judge

[fol. 99] (Supersedeas Bond on Appeal in Saint Paul-Mercury Indemnity Company Case, Civil No. 356)

(Filed in U. S. District Court on December 17, 1953)

United States District Court
Western District of Arkansas, Harrison Division

Saint Paul-Mercury Indemnity Company, Harry B. Hogan, doing business as Harry B. Hogan Painting Company, and Lonnie Sisney, Plaintiffs,

No. 356 vs. Civil Action

M. Lanza, doing business as Lake Charles Electric Company, Defendant.

That Traders & General Insurance Co., a corporation created, organized and existing under and by virtue of the

laws of the State of Texas, having its principal place of business in the City of Dallas, State of Texas, and duly authorized to carry on a general casualty insurance business within the State of Arkansas, and in the courts of the United States, is held and firmly bound unto Saint Paul-Mercury Indemnity Company, Harry B. Hogan, doing business as Harry B. Hogan Painting Company, and Lonnie Sisney, plaintiffs, in the full and just sum of Twenty-five Thousand Dollars ($25,000.00), to be paid to the said Saint Paul-Mercury Indemnity Company, Harry B. Hogan, doing business as Harry B. Hogan Painting Company, and Lonnie Sisney, their administrators, executors, successors, or assigns, to which payment, well and truly to be made, it binds itself, its successors and assigns firmly by these presents.

Signed and sealed this .... day of ....., 1953.

WHEREAS, on November 13, 1953, in an action pending in the United States District Court for the Western District of Arkansas, between the parties shown in the caption [fol. 100] above, being civil action No. 356, final judgment was rendered in favor of the plaintiffs, Saint Paul-Mercury Indemnity Company, Harry B. Hogan, doing business as Harry B. Hogan Painting Company, and Lonnie Sisney, and against M. Lanza, doing business as Lake Charles Electric Company, as defendant, for Twenty-two Thousand Five Hundred Dollars ($22,500.00); and the said defendant, M. Lanza, doing business as Lake Charles Electric Company, having filed a notice of appeal from such judgment to the United States Court of Appeals for the Eighth Circuit;

Now, THEREFORE, the condition of this obligation is such, that if the said M. Lanza, doing business as Lake Charles Electric Company shall prosecute his appeal to effect and shall satisfy the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, or shall satisfy in full such modification of the said judgment and such cost, interest, and damages as the said Court of

Appeals may adjudge and award, then this obligation to be void; otherwise to remain in full force and effect.

.....

BY .....

Approved:

....., 19....,

.....
United States District Judge

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* * * * * * *

[fol. 107] (Order extending time to file Record and docket Appeal in Carroll Case, Civil No. 352)

(Filed in U. S. District Court on January 6, 1954)

United States District Court
Western District of Arkansas, Harrison Division

Virgil G. Carroll, Plaintiff,

No. 352 vs. Civil Action

M. Lanza, d/b/a Lake Charles Electric Co., Defendant,
Harry B. Hogan, d/b/a Harry B. Hogan Painting Company and St. Paul-Mercury Indemnity Company, Intervenors.

The above named defendant, M. Lanza, d/b/a Lake Charles Electric Company, having on the 10th day of December, 1953, filed its notice of appeal in the above styled cause, and having within thirty (30) days from the date of filing of said notice of appeal made application for an extension of time for filing the record on appeal and docketing said appeal.

It is ORDERED, under Rule 73 (g) of the Federal Rules of Civil Procedure, that the time within which the said defendant, M. Lanza, d/b/a Lake Charles Electric Company, shall file the record on appeal and docket the appeal

in the United States Court of Appeals for the Eighth Circuit is hereby extended to and including the 20th day of February, 1954.

JOHN E. MILLER,
United States District Judge.

[fol. 108] Order extending Time to file Record and docket Appeal in Jennings Case, Civil No. 353)

(Filed in U. S. District Court on January 6, 1954)

United States District Court
Western District of Arkansas, Harrison Division

Paul A. Jennings, A Minor, by O. E. Jennings, his Next Friend, Plaintiff,

No. 353 vs. Civil Action

M. Lanza, d/b/a Lake Charles Electric Co., Defendant,

Harry B. Hogan, d/b/a Harry B. Hogan Painting Company and Saint Paul-Mercury Indemnity Company, Intervenors.

The above named defendant, M. Lanza, d/b/a Lake Charles Electric Company, having on the 10th day of December, 1953, filed its notice of appeal in the above styled cause, and having within thirty (30) days from the date of filing of said notice of appeal made application for an extention of time for filing the record on appeal and docketing said appeal,

It is ORDERED, under Rule 73 (g) of the Federal Rules of Civil Procedure, that the time within which the said defendant, M. Lanza, d/b/a Lake Charles Electric Company, shall file the record on appeal and docket the appeal in the United States Court of Appeals for the Eighth Circuit is hereby extended to and including the 20th day of February, 1954.

JOHN E. MILLER,
United States District Judge.

[fol. 109] (Order extending time to file Record and docket Appeal in Saint Paul-Mercury Indemnity Company case, Civil No. 356)

(Filed in U. S. District Court on January 6, 1954)

United States District Court, Western District of Arkansas.
Harrison Division.

St. Paul-Mercury Indemnity Company, Harry B. Hogan, doing business as Harry B. Hogan Painting Company, and Lonnie Sisney, Plaintiffs,

No. 356 vs. Civil Action

M. Lanza, doing business as Lake Charles Electric Company, Defendant.

The above named defendant, M. Lanza, d/b/a Lake Charles Electric Company, having on the 10th day of December, 1953, filed its notice of appeal in the above styled cause, and having within thirty (30) days from the date of filing of said notice of appeal made application for an extension of time for filing the record on appeal and docketing said appeal,

It is Ordered, under Rule 73 (g) of the Federal Rules of Civil Procedure, that the time within which the said defendant, M. Lanza, d/b/a Lake Charles Electric Company, shall file the record on appeal and docket the appeal in the United States Court of Appeals for the Eighth Circuit is hereby extended to and including the 20th day of February, 1954.

JOHN E. MILLER,
United States District Judge.

[fol. 110] (Statement of Points in Carroll Case, Civil No. 352)

(Filed in U. S. District Court on February 9, 1954)

United States District Court, Western District of Arkansas,
Harrison Division.

Virgil G. Carroll, Plaintiff,

No. 352 vs. Civil Action

M. Lanza, d/b/a Lake Charles Electric Company, Defendant,

Harry B. Hogan, d/b/a Harry B. Hogan Painting Company and St. Paul-Mercury Indemnity Company, Intervenors.

The points upon which appellant intends to rely on this appeal are as follows:

1. The remedies provided by the Missouri Workmen's Compensation Act are exclusive, and the defendant was entitled to judgment as a matter of law; and the Court erred in overruling defendant's motion for summary judgment.

2. The remedies provided by the Arkansas Workmen's Compensation Act are exclusive, and the defendant was entitled to judgment as a matter of law; and the Court erred in overruling defendant's motion for summary judgment.

3. As a matter of law, the Court could not consistently find that the defendant was negligent without also finding that the plaintiff, Virgil G. Carroll, was guilty of contributory negligence.

4. The judgment is excessive.

SHAW, JONES & SHAW
Merchants National Bank
Building,
Fort Smith, Arkansas

and

WRIGHT, HARRISON,
LINDSEY & UPTON,
1025 Pyramid Building,
Little Rock, Arkansas.

By Alston Jennings,
Attorneys for Appellant.

[fol. 111] (Proof of Service omitted in Printing)

[fol. 112] (Statement of Points in Jennings Case, Civil No. 353)

(Filed in U. S. District Court on February 9, 1954)

United States District Court, Western District of Arkansas, Harrison Division.

Paul A. Jennings, a Minor, by O. E. Jennings, His Next Friend, Plaintiff,

No. 353 vs. Civil Action

M. Lanza, d/b/a Lake Charles Electric Company, Defendant,

Harry B. Hogan, d/b/a Harry B. Hogan Painting Company and St. Paul-Mercury Indemnity Company, Intervenors.

The points upon which appellant intends to rely on this appeal are as follows:

1. The remedies provided by the Arkansas Workmen's Compensation Act are exclusive, and the defendant was entitled to judgment as a matter of law; and the Court erred in overruling defendant's motion for judgment on the pleadings or for summary judgment.

2. As a matter of law, the Court could not consistently find that the defendant was negligent without also finding that the plaintiff, Paul A. Jennings, was guilty of contributory negligence.

3. The judgment is excessive.

SHAW, JONES & SHAW,
Merchants National Bank Building,
Fort Smith, Arkansas

and

WRIGHT, HARRISON, LINDSEY & UPTON,
1025 Pyramid Building,
Little Rock, Arkansas.

By Alston Jennings,
Attorneys for Appellant.

[fol. 113] (Proof of Service omitted in Printing)

[fol. 114] (Statement of Points in Saint Paul-Mercury Indemnity Company Case, Civil No. 356)

(Filed in U. S. District Court on February 9, 1954)

United States District Court, Western District of Arkansas, Harrison Division.

St. Paul-Mercury Indemnity Company, Harry B. Hogan, d/b/a Harry B. Hogan Painting Company, and Lonny Sisney, Plaintiffs,

No. 356 vs. Civil Action

M. Lanza, d/b/a Lake Charles Electric Company, Defendant.

The points upon which appellant intends to rely on this appeal are as follows:

1. The remedies provided by the Arkansas Workmen's Compensation Act are exclusive, and the defendant was entitled to judgment as a matter of law; and the Court erred in overruling defendant's motion for judgment on the pleadings or for summary judgment.

2. As a matter of law, the Court could not consistently find that the defendant was negligent without also finding that the plaintiff, Lonny Sisney, was guilty of contributory negligence.

SHAW, JONES & SHAW,
Merchants National Bank Building,
Fort Smith, Arkansas

and

WRIGHT, HARRISON, LINDSEY & UPTON,
1025 Pyramid Building,
Little Rock, Arkansas.

By Alston Jennings,
Attorneys for Appellant.

(Proof of Service omitted in Printing)

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[fol. 124] (Transcript of Testimony)

Testimony of Dr. William H. Snead.

(Direct Examination By Mr. Fisher)

Dr. Snead practices medicine in Springfield, Missouri, and specializes in orthopedic surgery. (He is a well qualified orthopedic surgeon).

He first saw Virgil Carroll on January 26, 1953 at about 5:00 p.m. in St. John's Hospital at Springfield, Missouri. Mr. Carroll was in partial shock, had an obvious fracture of the left arm which was incased in a temporary splint, and complained of pain in that arm, the opposite shoulder, the back, and some pain in his chest. Mr. Carroll had received emergency treatment before coming to St. John's Hospital.

Mr. Carroll's most severe injury was a comminuted fracture of both bones of the left forearm, approximately four inches above the wrist. The injury was apparently of a crushing type, resulting in soft tissue damage to the forearm and also a rather deep abrasion and contusion in the area of the wrist itself. Mr. Carroll had pain and tenderness around his right shoulder and some tenderness of his low back. X-ray examination revealed the comminuted fracture of the forearm. A comminuted fracture is one that is not a clean break, but leaves small fragments around the breaking of the bone. X-rays of Mr. Carroll's shoulder, chest, and back were negative for any fracture or dislocation.

The first treatment was of an emergency nature. Mr. Carroll was given a general anesthetic, his arm straightened out and a plaster cast applied. The purpose of the emergency treatment was to make Mr. Carroll more comfortable. Mr. Carroll was obviously suffering from pain, which was probably very severe. Rather strong narcotics [fol. 125] were required to relieve the pain. The following morning an operation was performed on one of the bones of the forearm, the radius, and a plate and screws were used as internal fixation to immobilize the fracture. This type of surgery is known as open reduction and consists of a procedure whereby an incision is made through the skin over the fracture site; the soft tissues are either

separated or incised; the fracture is exposed and the bones put in their proper position; and then a metal plate was applied across the fracture site with screws in both fragments, so that the bone is held solidly. It was then closed by suture. This type of procedure is necessary in more severe fractures. Most fractures respond to closed methods, that is manipulation and application of casts.

The plate used on Mr. Carroll's forearm was possibly two and a half inches long and about three-eights of an inch wide and possibly a sixteenth of an inch thick. Four screws were used, two in each fragment of the bone.

Further x-ray examination after the first surgery revealed that the fracture of the other bone, the ulna, was not in an entirely satisfactory position, so it was necessary approximately ten to twelve days after the first surgery to go through another operation and follow a similar procedure with respect to the other bone of the forearm, the ulna.

He believed that Mr. Carroll was hospitalized for six weeks or two months.

After Mr. Carroll's first anesthetic, the following morning he developed acute urinary retention; he could not void or pass his water. He was seen by Dr. Joseph Sicelaff who treated him by inserting a catheter, and his recovery from that was uneventful.

[fol. 126] After Mr. Carroll's second operation, he developed a pneumonitis, which is a form of lung infection similar to pneumonia and he was treated by Dr. Harold Lurie of Springfield. Pneumonitis is caused primarily by bacteria, it is quite probable that the injury to his chest was a predisposing factor to its onset.

While in the hospital, Mr. Carroll required a great deal of physical therapy because of stiffness of his hand and fingers, and because of limitation of motion of his left shoulder. Mr. Carroll received physical therapy daily while in the hospital and for several weeks after his discharge from the hospital, and then for several more weeks he had it two or three times a week. The physical therapy

consisted of active and passive motion. Active motion is performed by the patient with his muscles, and passive motion is performed by the physical therapist. The physical therapy involved stretching scar tissue and moving sore muscles and sore joints, and that causes a fair amount of pain.

While he was in the hospital, Mr. Carroll received penicillin and streptomycin for the prevention and treatment of infection, and he also received narcotics, demerol and codeine, and an occasional sedative for the relief of pain.

Mr. Carroll had a sprain of the shoulder similar to a sprained ankle, which caused pain and limitation of motion. He had a contusion with possibly some low back strain which caused some pain and discomfort. His recovery from this has been good, although he does complain still of an occasional ache and pain in his low back which will probably not affect him to any great extent other than possibly an occasional ache and pain. It will not cause him any great disability.

He has seen Mr. Carroll on numerous occasions since his discharge from the hospital and last examined him in his office on October 23, 1953. At that time Mr. Carroll still had a mild limitation of motion of his left wrist and hand. [fol. 127] He had a considerable amount of atrophy, weakness, of the muscles of his arm and forearm. X-rays revealed union of both of the bones, radius and ulna, however sufficient bone had not been produced around the radius to give him a good, strong forearm. It would be subject to fracture from forces that would not break a normal forearm. It is his opinion that the plates, particularly the one of the radius, should be removed and bone taken from Mr. Carroll's pelvis and grafted at the fracture site in the forearm. It would probably require a cube of bone from the pelvis three-quarters of an inch to a side. He plans to perform this surgery within the next week or ten days. It will require hospitalization for a period of three to six weeks and would prevent Mr. Carroll from returning to work for a period of at least six months from the time of the surgery.

At the present time, Mr. Carroll is able to perform light work which does not require heavy lifting or excessive

strain of his left forearm. After Mr. Carroll has reached maximum recovery following the purposed bone graft, he will still have permanent disability of his left upper extremity of an estimated twenty per cent. The proposed bone graft will cause a fair amount of discomfort for a period of a week or two, with occasional pains for several months after the surgery. Probably both plates will be removed, because one is just beneath the skin and occasionally causes a certain amount of discomfort by pressure from within on hard objects.

He identified plaintiff's exhibit 1 as an x-ray of Mr. Carroll's left arm taken at his office on October 21, 1953, which shows the two bones in good alignment with an old fracture to both bones. The fracture of the smaller bone, the ulna, is well healed, the fracture of the larger bone is healed but there is a very definite defect in that bone.

[fol. 128] Mr. Carroll wore various casts from the time of his injury until sometime in May. The casts were of plaster and extended from just below the shoulder joint to the palm of the hand, with the elbow at a right angle.

At the present time, and without the proposed surgery, Mr. Carroll has an estimated thirty-five per cent permanent disability to the entire left arm.

(Cross-Examination By Mr. Jennings)

He had never seen Mr. Carroll before January 26, 1953. When he first saw him, Mr. Carroll was fully conscious, knew where he was, and did not give any history of having been unconscious at anytime that day.

He last examined Mr. Carroll on October 23. Prior to October 23, September 18 was the next preceding examination date. In a report dated September 19, 1953, he stated, "In my opinion the patient has no residual disability from injury to his back, chest or shoulder". He has not changed his opinion in that regard. As of the examination of September 18, he did not contemplate bone grafting as an immediate plan. One has bone grafts in mind if the bone does not heal properly. X-rays were made of Mr. Carroll's forearm on September 18 when he examined him. He stated in his report of September 19 that the disability to Mr.

Carroll's arm should decrease over a period of three to six months. That is quite probable. Mr. Carroll is still progressing in his recovery, and he anticipates that he will continue to do so.

Pneumonitis is a bacteria infection, and the bacteria did not enter the body through any laceration, but entered the body probably through the mouth.

[fol. 129] (Direct Examination By Mr. Fisher)

Paul Jennings was a patient of Dr. Snead. He first saw Mr. Jennings on the 28th of January, 1953, at St. John's Hospital in Springfield, Missouri. Mr. Jennings was quite apprehensive and complained of pain in the region of his pubic synthesis, just above the genitalia in the lower abdominal region. He also complained of some pain in his back and some pain in his chest.

X-ray examination revealed a linear fracture of the right pubic ramus, without displacement. X-rays of his back and chest were negative for fracture or any other pathology. Mr. Jennings was kept in bed in a reclining position for approximately four and a half weeks. At the end of that time, he was dismissed from the hospital, and was seen on several other occasions in the office. The last office visit was on October 22, 1953, at which time he was seen by Dr. Dillard, a partner of Dr. Snead.

In Dr. Snead's opinion, Mr. Jennings' recovery has been good. Mr. Jennings was advised not to go back to work or do any heavy work until after April 10, 1953. His injury was not a severe injury, but it was felt that there was undoubtedly injury to the strong ligaments between the pubic bone and that it would be well to allow sufficient time for that to heal properly.

Mr. Jennings will have a slight permanent disability, probably about five per cent. The fracture would be very slightly disabling, if any, but he also had a low back strain which could possibly cause his trouble with his work.

During Mr. Jennings' stay in the hospital, he was given codeine for pain; and when he was first seen on January 28, he seemed to be having a considerable amount of pain

at that time. It was necessary at that time to give him [fol. 130] several hypodermic injections of demerol to relieve his pain.

Mr. Jennings was last under Dr. Snead's treatment on April 10, 1953, at which time he was discharged as able to resume his employment.

Stipulation With Regard to Medical and Hospital Bills and Expenses.

It was stipulated that Paul Jennings had incurred total medical and hospital expenses by reason of his injuries in the sum of $697.80 and that the expenses represented reasonable charges.

It was stipulated that Virgil Carroll had incurred total medical, hospital and related expenses in the sum of $1,403.05, which expenses represented a reasonable charge; and that the anticipated fee of Dr. Snead for the proposed additional surgery would be $250.00.

Testimony of Harry B. Hogan.

(Direct Examination by Mr. Fisher)

Mr. Hogan lives at Springfield, Missouri, and is a painting and decorating contractor. Virgil Carroll, Paul Jennings, and Lonnie Sisney, the plaintiffs, were employed by Mr. Hogan for work on the Bull Shoals Dam site. Virgil Carroll was foreman on that job.

Mr. Hogan had entered into a contract with the Lake Charles Electric Company with regard to the painting work to be done at the Bull Shoals Dam site. He identified plaintiffs' exhibit 3 as the original contract signed by him and by M. Lanza on behalf of Lake Charles Electric Company. [fol. 131] The contract, Exhibit 3, is dated January 22, 1952, and provides that Harry B. Hogan Painting, in consideration of certain stated sums, "agrees to furnish all labor, material and necessary scaffolds and ladders to perform all painting" in connection with a described contract

with the United States Government at Bull Shoals, Arkansas. The contract contains the further provision: "It is further understood that the Harry B. Hogan Painting Company will carry the necessary insurance on his men in according (sic) with the rules of the State of Arkansas."

Mr. Hogan identified plaintiffs' Exhibits 4 and 5. Exhibit 4 is a copy of a letter he wrote in which he proposed to furnish all labor, materials, tools and equipment and finish work on painting certain trash racks consisting of eighteen units. The letter states that Mr. Hogan will begin work "after racks have been set in upright position and arranged so as to be accessible for painting." The letter further states: "The above price does not include sand blasting or setting racks in position for painting."

Exhibit 5 is a letter from Lake Charles Electric Company over the signature of C. C. Hargis authorizing Mr. Hogan to proceed with the painting of eighteen trash racks as proposed in his letter (Exhibit 4).

Mr. Hogan's original contract with Lake Charles Electric Company did not include painting the trash racks. Exhibits 4 and 5 represent the complete agreement with regard to the trash racks, which was supplemental to the original contract.

Mr. Hogan had not personally been on the job at anytime before the accident. Mr. Carroll was his foreman in charge with authority to deal with Lake Charles representatives [fol. 132] with regard to the proper setting of the objects to be painted.

Mr. Hogan had a standard workmen's compensation and workmen's liability policy, No. 6026726, issued by St. Paul-Mercury Indemnity Company to Hogan Painting Company of Springfield, Missouri, with the policy periods being from October 31, 1952, to October 31, 1953, covering the locations of Mr. Hogan in Springfield, Missouri, Coffeeville, Kansas, and elsewhere in the States of Missouri, Arkansas and Kansas.

Mr. Hogan was notified of the accident by long distance telephone call to Olathe, Kansas. He went back to Springfield and then went to the job site the next morning, January 27.

He did not make out any reports or file anything with the Missouri Workmen's Compensation Commission. Murray and Kent, insurance agents, handled those matters for him, and they turned it over to Mr. Fisher's law firm. He knew Mr. Fisher's law firm was handling it. He never discussed with Mr. Carroll or advised him with regard to his compensation claim.

(Cross-Examination by Mr. Jennings)

Mr. Carroll went to work for Mr. Hogan in January of 1951, sometime prior to the time when Mr. Hogan took the job at Bull Shoals. Mr. Carroll lives in Missouri and was employed in the State of Missouri. He was not employed solely for the Bull Shoals job, as the other men were, but was a regular employee.

Mr. Hogan did not personally make any report to the Missouri Compensation Commission. He left the matter up to Murray and Kent and the St. Paul-Mercury Indemnity Company and assumes that they did whatever the law required to be done.

[fol. 133] The Testimony of Virgil G. Carroll.

(Direct Examination by Mr. Fisher)

Mr. Carroll is fifty-three years old and lives at Springfield, Missouri. On January 26, 1953, he was working for Harry B. Hogan at Bull Shoals. He and other employees of Hogan were working on trash racks on that date and had been for approximately seven weeks. They had been using power cleaners and power sanders, and they were to put on a prime coat of paint, a second coat, and then a finish coat.

They had not worked continuously for seven weeks, because they could only work when the temperature was over fifty degrees. They had put in around 160-man hours up to January 26. Two coats had been put on after the cleaning process, and they were putting on the finish coat, which was the third coat, on January 26.

When he first saw the trash racks, they were in six stacks consisting of three racks in each stack lying on top of each other. Each individual rack was approximately

thirteen feet by ten feet by fourteen inches. The inner portion of the racks consisted of fins approximately five inches wide and seven-eighths of an inch to one inch thick, welded at the top and bottom and supported by a solid round rod extending through the fins and welded to the side of the racks. On one side the fins extended out about two inches past the outside frame of the racks.

The outer surface of the racks were cleaned while they were lying in the six stacks. The racks were then placed in an upright position by Lake Charles Electric Company in two rows, one row containing eight racks and the other ten. The ten-rack row was nearer the river, and the eight-rack row was nearer the road. The approximate distance between racks was thirty-six inches. The distance between rows was approximately four feet.

[fol. 134] The racks were setting on rails and the rails were on top of tie mud sills. The rails ran parallel to the stream in a north-south direction. These were continuous rails under each row. On top of the rows were two parallel wires. There was a number nine wire fixed to the end of the rail and then angling up to the top at an approximate thirty to forty-five degree angle where it was tied in to the lifting eyes on the top of each rack. Then there were separate and individual wires tied between the lifting eyes of each two racks. At the other end the wire ran from the top of the last rack down to a pin sunk in the ground at about a forty-five degree angle. There vere two lifting eyes on the top of each rack, one on each side. So, there were two rows of wire running from the end of the rail, or a pin in the ground, up to the top of the first rack, then across between racks, and then from the last rack down to the ground.

Also, there were two spreaders, one at each end, between each two racks. The spreaders consisted of two by fours with short pieces of one by four nailed to and extending out past each end. The spreaders were placed with the one by fours resting across the top of the racks and the two by fours being down between the racks.

Lonnie Sisney and Paul Jennings worked with Mr. Carroll on the racks. Two coats of paint had been applied to

the racks while they were in the upright position described. A simple method of scaffolding was used. Three two by fours were placed across between the racks, parallel to the rails, and work planks were placed on top of the two by fours to form a scaffold approximately four and a half feet off the ground. Sisney and Jennings worked upon the scaffolding. Mr. Carroll did not. None of Hogan's em- [fol. 135] ployees had anything to do with the placing of the racks in an upright position. There only job was to clean and paint them.

January 26, 1953, was the day that the application of the third coat was begun. They began first on the eight-rack row. They began work shortly after eight o'clock. First they had to heat the tar. Actual painting was begun at approximately 10:30 on the downstream end of the eight-rack row. The accident happened about 11:30, approximately an hour later.

Employees of Lake Charles Electric Company were working on the racks when the Hogan employees begin painting at 10:30. The Lake Charles employees were working on the ten-rack row. Mr. Carroll saw and knew what they were doing. They were taking the rails out from under the racks. They were not doing anything whatsoever about the racks in the eight-rack row. He did not ever at anytime know of any employees of Lake Charles coming over to the eight-rack row and commencing work on the eight-rack row. Mr. Hurst was the foreman in charge of the Lake Charles crew. Mr. Hargis was general superintendent for Lake Charles, and he was down there that morning. No employee of Lake Charles ever told Mr. Carroll that the Lake Charles employees were beginning to remove the rails from under the eight-rack row. Mr. Carroll did not recall observing any employees of Lake Charles commencing work or removing rails on the eight-rack row.

At around 11:30, Mr. Carroll was working on the ground between racks number 2 and 3 and noticed rack number 3 (the upstream rack) appeared to be falling away from him. Then he felt something touch him on the hip, and he got out as best he could. He didn't get completely out. His left arm was caught in between racks number 2 and 3. He was pinned there by his left forearm. Someone got a jack

and jacked up the bottom section so his hand could be slipped out. In referring to the racks by numbers, he [fol. 136] began numbering from the downstream end of the eight-rack row. He was working to the west, toward the stream, of the center of the racks. He had been stooping over painting the bottom portion of the rack. He did not push or knock over the racks. He did not do anything different from the way he had applied the other two coats of paint. The small amount of pressure exerted in painting the racks would not even compare with the extreme pressure used in cleaning the racks with power cleaners and power sanders. They were applying a thick paint with four inch brush.

On the morning of January 26 the racks appeared to be in the same position that they had been during the cleaning and application of previous coats of paint. Mr. Carroll did not at anytime remove any spreaders from between the racks. On the morning of January 26, he did not notice whether the spreaders were in place. He doesn't know if the spreaders were in place when the first two coats of paint were applied. He did not direct Mr. Jennings or Mr. Sisney to remove the spreaders, because it wasn't necessary.

After the accident, an employee of Lake Charles, Lefty, took Mr. Carroll to Mountain Home to see a Dr. Symonds. He was taken from there to St. John's at Springfield. He was under Dr. Snead's care there.

While his arm was between the racks, it was numb and there was no pain. After they got him out and the blood got into circulation, the pain was pretty intense. It increased as he went into town. When he got there, it was terrible, and they gave him two shots to ease the pain. The pain subsided considerably. On the hundred and twenty-three mile trip into Springfield, the pain began again, and it was definitely hurting when he got to Springfield. He suffered intense pain while the X-rays were being taken. He still has pain in his arm. It isn't constant pain, [fol. 137] but it hurts upon motion, and it increases as the day progresses. He also suffered extreme pain while

undergoing physical therapy because of scar tissue that formed on his hand. That treatment was given daily over a number of weeks.

After five weeks in the hospital, Mr. Carroll continued physical therapy treatments five days a week for a period of two and a half months. He contemplates having whatever surgery Dr. Snead recommends.

At the time of trial, he was not able to work as a painter. He is ambidextrous. He has not worked at all since the accident.

In cold or rainy weather, his right shoulder and lower back give him considerable trouble.

He received $2.50 an hour and expenses on the Bull Shoals job and averaged $125 to $130 a week plus expenses of approximately $25.00. He had averaged $5,000 a year income for the past ten years, doing construction work.

Mr. Carroll begin receiving compensation payments after the accident. (Over the objection of appellant, he testified that he did not have knowledge of any sort that he had a right of election as to whether or not his compensation claim should be considered under the Arkansas Act or the Missouri Act). A short time before the trial, he was advised by his attorney, Mr. Fisher, that he had the right to accept the Missouri law or the Arkansas law, and he elected the Arkansas law. He never filed anything with the Missouri Workmen's Compensation Commission. He never received any communication of any sort from the Missouri Workmen's Compensation Commission, and was never advised that they were taking jurisdiction of and handling his compensation claim. October 10, 1953, was the date that he decided where he wanted to make his compensation claim. (All of the above testimony with regard to the compensation claim was objected to by appellant).

[fol. 140] Mr. Carroll identified two pictures as Exhibit 10 and Exhibit 11 of the plaintiffs as showing the scene of the accident with the ten-rack row of trash racks still upright and the eight-rack row having fallen. The pictures are a fair representation of the conditions at the scene immediately after the racks fell. They show that the fins were extending out on the upstream side, that is the direction in which the racks had fallen.

The guy wires on the racks were taut, both from the ground to the first rack and between racks.

(Cross-Examination By Mr. Jennings)

[fol. 141] Mr. Carroll has lived in Springfield, Missouri, for approximately four years. He was employed by Mr. Hogan at Springfield and worked for Mr. Hogan prior to the time that he went on the Bull Shoals Dam job.

He received thirty-four weekly payments of $30.00 each in accordance with the Missouri Workmen's Compensation law. The $30.00 represents the maximum weekly payment under the Missouri compensation law. Those payments were made by Mr. Fisher by delivery of drafts drawn on St. Paul-Mercury Indemnity Company. Mr. Carroll endorsed the drafts and cashed them. Around the first part of March, 1953, Mr. Fisher, as Mr. Carroll's lawyer, filed the present lawsuit. In October, Mr. Carroll was advised that he had a right to take compensation under the Arkansas law. The maximum weekly compensation under Arkansas law is $25.00. Mr. Carroll chose to take the $25.00 rather than the $30.00 per week. Mr. Fisher suggested that he do that. Mr. Fisher explained to him that he had the right to use the Missouri compensation or the Arkansas compensation law. Mr. Fisher explained that he would get $5.00 less per week under Arkansas law. Mr. Fisher advised that it was elective and that Mr. Carroll could stay within the Missouri rights or take the Arkansas compensation. Mr. Carroll wouldn't definitely say that Mr. Fisher advised him to take the Arkansas compensation. He would say that Mr. Fisher didn't advise him.

The racks were set up in the upright position sometime in November of 1952. Some painting and some cleaning was done before they were put in an upright position. He

does not know exactly how much work was done before the racks were set upright. After they were set upright and prior to January 26, they were in a good stable position. On the morning of January 26, Mr Jennings and [fol. 142] Mr. Sisney arrived on the job first, then Mr. Carroll, and they were all three there when the first Lake Charles employee arrived. They spent the time before they started painting in heating the paint. He was concerned about the amount of time that was being spent on the racks, and he was aware that the job was probably not going to be profitable.

The Lake Charles employees stated work reblocking the ten-rack row before the painting was begun, and Mr. Carroll saw them working there. He had some conversation with the Lake Charles employees. He knew that the Lake Charles employees were reblocking and putting crossties in. The alleyway between the ten-rack row and the eight-rack row was approximately three to four feet wide. When they started painting, they started on the downstream, south, end of the eight-rack row. They started on the south side of the number one rack and then moved between one and two racks. Mr. Carroll was working from the ground up, and the other two men were doing the work that was required to be done from the scaffold. Mr. Carroll never got on the scaffold himself on the morning of January 26. At the time of the accident he was between racks number two and three, numbered from the south, and to the west of the center line of the racks. At the time of the accident he was working on the bottom part of the southern side of rack number three. He assumes that he had completed both sides of racks number one and two, bottom part.

At the time of the accident Mr. Jennings and Mr. Sisney were together on the scaffold between racks number four and five. Nobody was in the space between racks number three and four. He doesn't have any idea which rack the Lake Charles men were working on at the time of the accident. They began work on the ten-rack row about nine o'clock. He doesn't remember exactly when Mr. Hurst arrived. He did not have any conversation with Mr. Hurst about the spreader braces. Between the time

the racks were first set in the upright position and Janu-
[fol. 143] ary 26, there were no Lake Charles men work-
ing around the racks. The pictures, Exhibit 10 and Exhibit 11, show spreader braces lying around, but there is not a single spreader brace in place on the ten-rack row. The spreader braces had to be moved in order to paint the tops of the racks, but he believes that they were merely lifted up, painted under, and then immediately replaced. He never had any connection with the spreader braces at all. Some of the spreader braces fit tight and some were very loose.

Mr. Carroll was taken to the hospital by Lefty Harvey in a pickup truck. He recalls the trip, he was suffering from shock or pain, but he recognized who was driving him and gave some instructions about bringing his clothes and cigarettes and things. He had some conversation with Mr. Harvey to the effect that he was thinking about getting out from between the racks before the accident happened and if he had done so it never would have occurred; but the reason for that conversation was that he was referring to the fact that he had looked at his watch to see if it was time to knock off for lunch and had decided that it was too early.

It was possible to see through the racks, but the fins obstructed one's vision so that one could probably only see the next rack.

(Redirect Examination By Mr. Fisher)

It was explained to Mr. Carroll that although the maximum weekly payment was less under Arkansas law than under Missouri law, any payment for permanent disability under Arkansas law was in addition to previous weekly payments, which it was not under Missouri law, and they thought Mr. Carroll would get a little more money under Arkansas law.

[fol. 144] Testimony of Paul A. Jennings.

(Direct Examination by Mr. Fisher)

Mr. Paul Jennings is twenty years old and lives at Mountain Home, Arkansas. On January 26, 1953, he was employed by Harry B. Hogan Painting Company. He had

been working at Bull Shoals 9am for ten weeks. He is a painter apprentice and was helping paint the trash racks on January 26. He reported to work about eight o'clock and began painting about 10:30. They had built a fire and heated the paint and then gone to get coffee and then he and Mr. Sisney begin working on the tops of the racks from the scaffold, and Mr. Carroll worked on the bottom of the racks. They had worked about an hour before the accident happened. They began painting on the downstream end of the eight-rack row. At the time of the accident, he was between the fourth and fifth racks, numbering from downstream on the side toward the river, painting. He was facing upstream. The first thing he knew, he lost his footing and fell. The trash racks fell and the scaffolding fell out from under him. He fell upstream on the south side of the fifth rack. He was in between the racks. Plaintiffs' Exhibit 11 shows boards extending out between rack number four and rack number 5 which is the scaffolding.

He knew that there were Lake Charles employees working there, getting those rails. When he started painting, they were working on the ten-rack row next to the river. He was painting on the eight-rack row. He had not done any work that morning on the ten-rack row. He did not know at anytime that Lake Charles employees had commenced work on the eight-rack row. He never heard any of the Lake Charles employees tell him or Mr. Carroll that they working on the eight-rack row; he had not seen them working on the eight-rack row; and no one had given him any warning that they were working on the eight-rack [fol. 145] row. He doesn't know if the spreaders were in place or not. He doesn't know much about the spreaders. He doesn't know if he ever took a spreader out of position and left it out of position, but he doesn't recall doing that, and doesn't believe he did. He did not move any spreaders that morning.

After the racks fell, he was hung up between the racks for twenty-five or thirty minutes. He was then taken by ambulance to Mountain Home and remained two days under the care of Dr. Saltzman. He was then taken to Springfield, Missouri and placed under the care of Dr. Snead. He was in the hospital about five weeks. He had a badly bruised eye, some cuts on his face, and a fractured pelvis.

He was bedfast for four weeks, and he wasn't able to work for three and a half or four months. He was weak, had lost a lot of weight, didn't feel good, and was waiting for his bones to mend. After the accident he had quite a bit of pain for three or four days or more. He was uncomfortable for about three and a half weeks.

He has been working during the past summer, but has not done any manual labor that required any lifting or strenuous work. He has a sharp steady pain in his back when he exercises.

He was making $44.00 for a forty hour week while working for Hogan.

(Cross-Examination by Mr. Jennings)

Mr. Hargis, Mr. York and Mr. Crosby, all employees of Lake Charles Electric Company, came up to where the racks were after Mr. Jennings came to work and before he left to get coffee. He thinks he was there when Mr. Hurst and the others came. They started to work reblocking the bank of ten. He didn't watch them or pay any attention to what they were doing, nor help them.

[fol. 146] They began their painting on the south end of the eight-rack row. It was necessary to move the scaffold. The scaffold had been moved from the outside of rack one to between racks one and two, then between racks two and three, then between racks three and four, and finally between racks four and five, where it was at the time of the accident. He doesn't know how long before the accident the scaffold was moved the last time.

He is six feet three inches tall, and when standing on the scaffold, he could see over the tops of the racks. It was necessary to lift the spreader braces in order to do the painting, but he doesn't know whether he actually ever took any of them completely out of position or not. The pictures, Exhibits 10 and 11, show spreader braces on top of the rack of ten and on the ground, but he doesn't know if that is the condition they were in on the morning of the accident, or not.

The fire that was being used to heat the paint was directly south of the eight-rack row, some thirty or forty feet.

They were heating a drum of water and setting five gallon paint buckets into the water to heat the paint. He and Mr. Sisney each had a bucket. He doesn't know if he had had to refill his bucket between the time he started painting and the time of the accident, it could have been necessary to refill.

Testimony of LONNIE SISNEY.

(Direct Examination by Mr. Goodwin)

Mr. Sisney is thirty-five years old and lives near Flippin, Arkansas.

On January 26, 1953, he was employed by Hogan Painting Company and had been for about two and a half or [fol. 147] three months. He was paid $1.50 an hour. His earnings for the year 1952 were $3,800.00.

Mr. Carroll was his foreman, and the other helper was Paul Jennings. They went to work about eight o'clock on the morning of January 26 and started heating the tar. Then they went to get some coffee and came back and started to work about 10:30. He saw some Lake Charles Electric employees around the ten-rack row. On that day, he did not do any work on the ten-rack row, nor did he see Mr. Carroll or Mr. Jennings doing any work on that row. They begin their painting on the south end of the eight-rack row. He was working on the scaffold. He and Mr. Jennings were together on the scaffold and were working between the fourth and fifth racks, numbering from the south, at the time of the accident. Nothing unusual had happened that morning with reference to the painting of the trash racks.

Considerable pressure was applied in cleaning the trash racks, but very little pressure was involved in painting them. The racks never wobbled or gave any feeling of uneasiness.

He saw the Lake Charles employees around the ten-rack row and in the aisle between the two rows. That was when he was painting on the eight-rack row. He had no reason to believe that Lake Charles men were doing any work on the eight-rack row, and he was never told by any-

body that the Lake Charles men were going to move over to the eight-rack row. Right up to the time that the trash racks fell, he thought the operations of the Lake Charles men were on the ten-rack row. There was no physical connection between the two rows. At the time of the accident, he was between the fourth and fifth racks facing south. He was on the roadside. The first knowledge he had that they were falling, it seemed like one of the racks was coming toward him.

He doesn't know whether the spreader braces were all in place or not. He did not tamper with the spreaders at anytime that morning or ever remove any of the spreaders. [fol. 148] He doesn't know that he ever painted under any of them.

(Cross-Examination by Mr. Jennings)

Mr. Sisney was there at the trash racks at the time the first of the Lake Charles employees got there. He knew those men who were working for Lake Charles.

One man could move the scaffold. It could be taken around either side. It was longer than the space between the banks of racks.

He could hear the Lake Charles employees talking and so on while they were working. None of them talked to him while he was working. He had a few words with them before he started painting. He didn't go over and watch what they were doing or have any conversation with them. He knew that they were moving the rails from under the ten-rack row, and they were talking and making some noise as they were doing that.

He thinks that it is probable that he had to go back for more paint after he started painting that morning.

He is six feet tall, and, when standing on a scaffold in a normal position, he can see the top of the rack.

Testimony of Virgil G. Carroll.

(Recalled by the Court)

The racks weighed fifty-four hundred pounds each and were ten feet high as they stood when they were being painted.

The two by fours for the scaffolding were laid upon the rods that run horizontal across to either side of the rack and extending through the fins. The planks for the scaffolding rested upon the two by fours. The lower rod would be about eighteen or twenty inches from the ground and the next rod would be about that far above the first one. The fins were approximately five inches apart.

[fol. 149] Testimony of David B. York.

(Direct Examination by Mr. Goodwin)

Mr. York is thirty-six years old and lives near Flippin, Arkansas.

On January 26, 1953, he was working for Lake Charles Electric Company as a truck driver and had been for about fourteen months. He remembers the location and layout of the trash racks and has heard all the testimony in the case. As truck driver, he was one of the crew that had unloaded the trash racks and laid them down flat on the ground, in six stacks, three to a stack. They stayed in that position for some period of time, and then railings were taken down to where the trash racks were to be placed upright. Ties were used as underpinning for the rails, and the rails were leveled so that the trash racks would be all the same height. The rails were set north and south, and each rack set across east and west. The ties were running east and west. A truck with an A frame was used to pick up the trash racks with the lifting eyes, then the truck was backed directly in between the two rails and the rack was set upright on the rails.

The trash racks were about three feet apart, and the aisle between the two rows of trash racks was approximately four feet wide.

He helped make the spreaders, and they were placed right down between the racks. Then the wire was run between the racks and down to pins driven into the ground. All this was done around the last of November, 952. The spreaders were placed in near the lifting eyes. They were supposed to be under the wire, but he could not say that

they were exactly under it. The spreaders were not attached in any way to the trash racks, they just lay in there loose, and the scabs kept them from falling through.

On the morning of the accident, January 26, Mr. Hargis got him and Mr. Crosby to go down to the racks to take the rails from under them. They went by the lumber yard and picked up scrap lumber for cribbing to use in place of the [fol. 150] rails. He and Mr. Crosby started to work around 8:30. They started on the ten-rack row, on the riverside, downstream side. They were using a four by four or four by six approximately twelve feet long as a pry bar. There was plenty of room to operate the pry bar on the west side of the trash racks. Mr. Crosby started using the pry bar, but discovered that one man could not handle it. They waited until other Lake Charles Electric employees arrived, and two men handled the pry bar. They worked on the river end of each rack in the ten-rack row, beginning downstream and working north. The painters had not begun to paint the racks in the eight-rack row when they began work on the ten-rack row. He doesn't know exactly when the painters began painting, but it was some little time after he and the others started work on the ten-rack row. All of the work on the ten-rack row had been completed before the accident. The Lake Charles employees then begin work on the upstream end of the eight-rack row, the north end. All of the rails had been removed from the ten-rack row. The work on the eight-rack row was begun at the north end on the aisle side. When working on the aisle side, it was necessary for the pry bar to go between the racks in the other row of racks.

To the best of his knowledge three racks in the eight-rack row had been raised at the time of the accident. The painters were working on the eight-rack row when the Lake Charles employees began their work on the north end of that row. The painters were between racks number four and five at the time of the accident. That is, Mr. Sisney and Mr. Jennings were between racks number four and five, Mr. Carroll was between number two and three. He presumes Mr. Carroll was on the ground. Sisney and Jennings were on the scaffold between four and five.

[fol. 151] Mr. York was between racks number one and two on the aisle side. He was putting a tie under rack

number one and fixing to travel it on through to carry the two first racks. They were using one tie as a base cribbing for two racks. He was putting in cribbing from the south end of number one to supply number one and two. Number one and two had not been disturbed in anyway at that time. The cribbing referred to was six by eight crossties. There was room to shove them under the rack without prying up the rack. There was a space of three or four inches between the top of the tie and the bottom of the trash rack. He was down between rack number one and two getting ready to place the tie under number two when he felt rack number one press against his shoulder, so he jumped out into the aisle. He ran into Mr. Hargis just west of the end of the number one rack, in the aisle.

On top of the ties, two by fours or one by fours were placed as cribbing so that the racks, when piled up, would clear the rails.

The ground was fill dirt that had never really settled to a hard firm foundation. No level was applied to the cribbing on January 26, as had been done when the rails were put in. He couldn't say that all of the cribbing was the same height after it was placed under the racks.

He never heard anyone tell the painters that the Lake Charles employees were moving over to the eighth-rack row. Mr. Hurst was his foreman.

One could see straight through between the fins, but it was not possible to see at an angle through the fins.

He does not know whether any of the Lake Charles men removed any of the spreader braces.

[fol. 152] (Cross-Examination by Mr. Jennings)

Mr. York participated in setting up the racks in November, 1952. The racks were hoisted on a truck, and the truck was backed in between the rails. They started setting up the racks at the north end, so the truck would be backed up from the south end of the rails up to the north. The crossties did not run full length across between the rails. He had not done any work around the racks after they were set up until January 26. He and another man were cutting the spreader braces according to measurements

given to them, and the spreader braces were then put in place by the rigger. Two were placed between each rack, then the wire was tightened between the two racks. The spreaders were cut to measurement.

When he and Mr. Crosby and Mr. Hargis first got down to the trash racks at around 8:30 on January 26, all they actually did before Mr. Hurst and the rest of the men got there was to find out how much force would be needed to raise one of the racks. Mr. Hurst and the rest of the men arrived around 9:30, about an hour after him. Mr. York had known Mr. Sisney pretty well for about two years. He suppose that while he was waiting for Mr. Hurst and Sisney was waiting for his paint to heat up they had some conversation. He dosen't believe that the painters came around to talk to him. He is pretty sure that none of the painters helped with the pry bar.

The work he was doing was getting the crossties and putting them under the racks. He had put crossties under all of the west side of the bank of ten and all of the east side of the bank of ten. The crossties were nine or ten feet long, and they would support at least two of the trash racks. After the bank of ten was finished, he then put crossties under racks number eight and seven, six and five, four and three, and two and one on the west side. He had to stay ahead of the men doing the prying and cribbing. [fol. 153] He would have the crossties underneath and ready when the men with the pry pole got to the rack. At the time of the accident he had placed crossties under the west end of racks, five, six, seven and eight. He had not placed any under racks three and four. Because of the crowded condition of the aisle, it was necessary to slide the crossties all the way from the south end. He identified a crosstie shown in Exhibit No. 11 as one placed by him.

When the men were working on the east edge of the bank of ten, they would take their pry bar in between the racks in the bank of eight. The racks in the bank of ten were not necessarily directly opposite the racks in the bank of eight. In doing the whole row of ten, the men with the pry bar must have been in between every one of the open spaces between the racks in the bank of eight.

He is not sure that Mr. Carroll was on the ground before the accident, but after the accident Mr. Carroll was standing on the ground between racks number two and three, in the aisle, with his left arm caught.

Mr. York had not been talking to Mr. Sisney at the time or just before the accident happened. He does not know whether or not the painters at anytime after they started working had to go refill their buckets and get more paint. Mr. York was not one of the men regularly using the pry pole. If he was on the pry pole at all, it was just to lend a hand.

(Redirect Examination by Mr. Goodwin)

The cribbing used under the racks had been unloaded to the south and east end of the eight-rack row. They were scattered in the area east and south of the eight-rack row.

Three of the racks in the eight-rack row had been pryed up on the west side, the aisle side, before the accident. [fol. 154] Those were the three northern most racks.

TESTIMONY OF H. D. CROSBY

(Direct Examination by Mr. Goodwin)

Mr. Crosby lives at Three Brothers, Arkansas, something like seventeen or eighteen miles from Bull Shoals Dam.

On January 26, 1953, he was employed by Lake Charles Electric Company, having worked for that company for about fifteen months. He has heard all the testimony in the case. The first time he had worked around the trash racks was on the morning of January 26. He went down to the trash racks with Mr. Hargis and Mr. York in a pickup truck. They stopped at the lumber yard to pick up some timbers to be used for cribbing and took them down to the trash racks and unloaded them downstream from the racks. They were unloaded just a short distance from the racks.

He began work on the river side of the ten-rack row. He set a block out a little bit away from the end of the trash rack and then placed the end of the pry bar under the rack and, using the block as a fulcrum, attempted to pry up the rack. They found that it required two men to handle

the pry bar and another man to put the cribbing under. More help was needed. He busied himself with carrying the cribbing and let the other men do the prying. The first operations were on the ten rack row. They went up the side next to the river and then down the other side, on the aisle side. He was not present when the accident happened. He had gone to the power house for tools and more cribbing. He was some two hundred yards away.

The painters had not begun painting when he first got to the racks that morning. He and Mr. York were prying on the end of the first rack in the ten rack row before the painters started any work at all. He had been at the racks for some thirty or forty-five minutes before the other Lake Charles employees arrived. The painters were painting on the eight rack row, but he does not know the location of [fol. 155] the painters on that row when the accident happened. The ten rack row had been completed before the accident, and at least one of the racks on the eight rack row had been pried up when he left to go to the power house.

He never heard anybody notify the painters that the Lake Charles employees were moving their operations over to the eight rack row.

He helped get Mr. Jennings out from between the racks.

He observed that the wire from the downstream end, aisle side of the eight rack row running down to the ground was broken. The other guy wire from the number one rack to the ground on the south end was broken.

(Cross-Examination by Mr. Jennings)

Mr. Crosby did not have anything to do with setting up the racks in December. The first connection he had with the racks was on the morning of January 26, 1953. When he arrived at the scene where the racks were, the painters were already there, but had not started painting. They were heating their paint in a pot a few feet south of the bank of eight racks. The cribbing that he had picked up was unloaded south, in the same area. The short timbers were to be placed on top of the crossties in order to bring the level up to the right height. The timbers were long enough to

extend out on both sides of the base of the rack. He does not remember whether he had anything to do with helping York place the crossties. His principal job was to have the short timbers ready to place on top of the crossties.

The painters did not come over to where the Lake Charles employees were working, and he does not remember one of the painters helping with the pry bar.

[fol. 156] Testimony of PAUL ZANDER.

(Direct Examination By Mr. Goodwin)

Mr. Zander lives in Little Rock, Arkansas. He is a civil sanitary engineer with an engineering degree in civil engineering, structural specialty, from the University of Illinois in 1933. He had engaged in the profession of structural engineer for twenty-two years. He was in the Seabees in the Second World War, both at home and overseas, in charge of heavy construction, such as building piers, shore structures and buildings, and net stations. He belongs to the American Society of Civil Engineers, the National Society of Professional Engineers, and the Arkansas Society of Professional Engineers.

He has heard all the testimony in the case.

An ordinary, careful and prudent person, in his opinion, would not have permitted the trash racks to be pried up while men were standing between the racks painting them, because they represented an unstable structure and the changing of the foundation would endanger any man that might be between them. The cribbing set upon soft fill ground would cause instability, as would the fins. The fins constituted about four thousand pounds of the fifty-four hundred pound weight of the trash rack and were so located as to cause the center of gravity to be toward the side of the trash rack that the fins were on. This would create an unbalanced condition in the trash rack itself. Also the pry bar could shift a little, moving the bottom of the rack, while the top of the rack being held by wires was stable, and the rack would thereby be unbalanced. Furthermore, the blocks on soft fill ground would furnish a poor foundation. Also, raising the rack

would put tension on the wire, which tension would gradually increase as each rack was raised, which would eventually cause a rupture of the wire. It would not be pru- [fol. 157] dent to put any men between the racks when the racks were moved in any way, shape or form. (The Court sustained an objection to all of the above testimony, but allowed it to go into the record at the request of appellees.)

Defendant's Motion for Judgment.

At the close of all testimony on behalf of the plaintiffs, the defendant moved for judgment in all three cases, and particularly in the Carroll case on the ground that Mr. Carroll was drawing compensation under Missouri compensation law. The Court deferred ruling on the motion for judgment in the Carroll case on that particular ground, and overruled the motion as to the other plaintiffs and the other grounds.

Testimony of C. C. Hargis.

(Direct Examination By Mr. Jennings)

Mr. Hargis lives at Lake Charles, Louisiana, and is employed by the Lake Charles Electric Company. He has worked for Lake Charles Electric Company for three and a half years and was superintendent for that company at the Bull Shoals Dam site on January 26, 1953. He went down to the trash racks on that date shortly after eight o'clock with Mr. Crosby and Mr. York to assemble materials and test a suitable method of raising the trash racks. The rails under the trash racks belonged to the government, and it was necessary to remove them and return them to the government in accordance with the gov- [fol. 158] ernment's demand. The painters arrived at the racks about the same time he did. They started a fire to heat the paint.

The first thing he did was to unload from the pickup truck the [the] shoring materials. They were unloaded near the downstream end of the racks. He and Mr. York and Mr. Crosby then procured a suitable timber for

prying and attempted to raise the first rack, but found out they did not have sufficient manpower. One or more of the painters assisted in raising the first rack to help test how much weight would be needed to raise one. This work was done on the downstream end, riverside, of the ten rack row.

Mr. Hargis did not actually participate in the work that morning, but was in and out several times. He was not at the racks when they fell. He was approximately 200 feet away to the south and east, assuming that downstream was south. That is not a true direction, but it is the direction everybody has used for reference purposes during the trial.

At least four racks of the eight rack row had been raised at one end, on the aisle side, before the accident. The bank of ten had been completed on both sides. The work on the bank of eight had begun on the north end.

There were about eight Lake Charles employees working there, with Mr. Hurst, as foreman, in charge of the actual operation. Mr. Hurst and the men with him arrived at the trash racks between 9:00 and 9:30. They had been working for an hour and a half to two hours before the accident, which happened about 11:30 or 11:40.

The pry bar was a four by six, fir timber, roughly twelve feet long. In working on the east side of the bank of ten, the pray bar was used between the racks in the eight rack row. In working on the west side of the racks in the bank of eight, the pry bar was used between the racks in the bank of ten. The racks in the two rows were [fol. 159] not set up directly opposite each other. No attempt had been made to line them up with one another.

After the racks were set up in November under his direction, he checked the manner in which they were set up. The testimony of the other witnesses in that regard is generally correct.

With regard to the spreader braces, the instructions had been given for each brace to be cut to individual measurement, and the wires across the tops of the racks would have kept the brace in a secure position. The wires would

tend to pull the racks together, and the spreader braces would tend to hold them apart, and the combination of forces would make a firm, stable construction.

Between the time the racks were set up in November of 1952 and January 26, 1953, Lake Charles Electric Company had nothing else to do with the racks. So far as he knows no Lake Charles employee had been on or around the racks during that time. There was no work by Lake Charles Electric Company that would make it necessary to remove the spreader braces.

At the time of the accident, to the best of his memory Mr. Carroll was between racks two and three in the line of eight and the other two men were between racks five and six.

In his opinion the ends of boards shown in the pictures, plaintiff's Exhibit 10 and 11, between racks number four and five, which have previously been identified as the ends of a scaffold, could also be shims placed in there to keep the racks from slipping during the removal of the men after the racks had fallen. He knows that shims were placed between some of the racks for that purpose. Mr. Jennings was pinned bodily between two racks. Mr. Carroll was pinned by one hand. Mr. Carroll was removed first by the use of both jacks and pinching equipment. Somebody had to go get the jacks.

Mr. Carroll went to the hospital in the Lake Charles Electric pickup driven by the clerk, Mr. Harvey.

[fol. 160] The photographs introduced as plaintiffs' Exhibits 10 and 11 were taken on the same day of the accident in the afternoon after the men had been removed, and they represent the situation as it existed immediately after the accident.

(Cross-Examination By Mr. Fisher)

The photograph marked plaintiffs' Exhibit 10 shows the ten rack row still in an upright position. It does not show any of the spreaders in place between the racks. There are what appear to be spreaders up on top of the racks. It is possible that the ten rack row was in that

condition when work was begun on it. The painters had not been working on the ten rack row that day. He did not remember particularly checking the spreaders before the work was begun.

In some of the prying operation the pry bar would be out straight and in other instances it would be at an angle.

In addition to the guy wires coming down from the end racks, wooden supports or braces had been placed at the end of each row of racks as a temporary measure only, while other work was being done in resecuring the racks.

(Redirect Examination By Mr. Jennings)

The painters were not painting on the ten rack row on the day of the accident, but they had painted on those racks previously. They were using a coal tar paint. Such a paint has to be heated to at least 100 degrees and kept near that temperature. If the air temperature was as much as 20 or 30 degrees less than the proper paint temperature, it would not be possible to paint from the same bucket for an hour without reheating. The temperature that day was 50 degrees.

[fol. 161] Testimony of F. L. Harvey.

(Direct Examination By Mr. Jennings)

Mr. Harvey's permanent home is Mountain Home, Arkansas. At the time of the trial, he was working in Des Moines, Iowa, for the Babcock and Wilcox Company. He is not working for or connected in any way with Lake Charles Electric Company.

On January 26, 1953, he was employed by Lake Charles Electric Company for general office work. He arrived at the scene of the accident shortly after the racks fell. Mr. Carroll had been released, and he took Mr. Carroll to the pickup truck. Mr. Carroll asked him to get a carton of Camels and a handbag and some clothing out of his truck to put in the Lake Charles truck. Mr. Carroll said something to the effect of, "I was just thinking we ought to have got out of there and then it happened". That is not

an exact quotation, but is the effect of what he said. Mr. Carroll recognized Mr. Harvey and called him "Lefty". He took Mr. Carroll on to the hospital.

(Cross-Examination By Mr. Fisher)

He didn't take Mr. Carroll's remarks to mean that he was speaking of the approach of the noon hour. He doesn't claim that he has quoted Mr. Carroll's exact words, but he has quoted him to the best of his knowledge as he remembers it.

Testimony of J. R. Wood.

(Direct Examination By Mr. Jennings)

Mr. Wood lives at Flippin, Arkansas, and is a distant relative of Mr. Arthur Wood, one of the attorneys for Mr. Sisney. He came from Flippin to Fort Smith with Mr. Arthur Wood, at his request, on Wednesday.

He was employed by Lake Charles Electric Company on January 26, 1953, and worked for Lake Charles last on May 22, 1953. He has no connection with Lake Charles at this time.

[fol. 162] He was working on the racks on the day that they fell. He, Doyne Hurst, Britt Copeland and C. Q. Smith went to work around 9:00 that morning. They were all employed by Lake Charles, and Mr. Hurst was foreman. Mr. Hargis, Mr. Crosby and Mr. York were there at the racks when they arrived. Mr. Hargis did not actively participate in the work, mostly he was giving the orders. Mr. Smith and Mr. Copeland were on the pry pole; Mr. York and Mr. Crosby were getting the heavier timbers in, sliding them under the racks; and he was getting the smaller blocks to place on top of the crossties to build the height up above the rails. Mr. Hurst was actually placing the smaller pieces on top of the crossties.

They had started at the south end of the bank of ten racks, raised the west end of those racks, then, starting from the north, raise the east end of the racks in the ten bank, and then, starting from the north, had raised either

four or five of the west ends of the racks in the bank of eight. Numbering from the south, racks one, two and three in the bank of eight had not been raised, and number four was the last one that was raised and set back down. Number four was the rack being worked on immediately before they fell.

At the time the racks fell, I was standing in the aisle between the two rows practically even with rack number four. He is pretty sure that the pry pole had been removed, and Mr. Smith and Mr. Copeland were not actually engaged in lifting at the time the racks fell. Mr. Hurst was down on his knees, astraddle the rail, to the north of either rack number three or rack number four, checking the blocking under that rack. Rack number three might have been the last one that was raised, or it could have been number four. He does not know where Mr. Carroll was. Mr. Jennings was between racks number four and five. He does not know where Mr. Sisney was. Mr. Hurst {fol. 163} was either between the same racks that Jennings was or one space to the south, and he believes it was one space to the south. He believes they had passed the racks that Mr. Jennings was working between.

The last he heard of Mr. Smith, he was in St. Paul, Minnesota.

Mr. Wood did not have anything to do with the original operation of placing the racks on the rails in November.

When work was being done on the east end of the racks in the bank of ten and on the west of the racks in the bank of eight, the men at the end of the pry bar were between the racks in the opposite row. It was necessary for the men on the end of the pry bar to be between everyone of the spaces between the racks in the bank of eight.

(Cross-Examination By Mr. Goodwin)

The spreader braces on the ten rack row were not in place on the morning of January 26, nor were the spreader braces on the eight rack row.

The cribbing being used was of varying sizes and lengths and not specially made for this project.

He did not ever hear Mr. Hargis or Mr. Hurst notify the painters that they had moved over from the ten rack row to the eight rack row. He was not at all times in a position to hear if any such notice had been given, and he possibly wouldn't have paid any attention to it if he had heard it.

After the accident, the guy wires leading down from the south end of the eight rack row were both broken.

Statement By Counsel For Appellant.

In response to an inquiry of the Court, it was stated by Mr. Jennings, counsel for appellant, that the railroad rails used were thirty-three feet in length and that there was just one rail on either side in the bank of ten.

Testimony of Doyne Hurst

(Direct Examination By Mr. Jennings)

Mr. Hurst's permanent residence is Flippin, Arkansas, but he is presently employed by the government in Alabama.

On January 26, 1953, he was employed by Lake Charles Electric Company, having worked for them about twelve [fol. 164] months. He worked for Lake Charles Electric Company until May 20, 1953, and has had no connection with Lake Charles Electric since that time.

He was foreman of the crew reblocking the trash racks at Bull Shoals Dam site. He was also in charge of the crew that put the racks in place in November, 1952. The testimony of the other witnesses with regard to the set up of the racks, the general system of wires and braces and rails is correct. Two by twelves, from two to four feet long, were placed under the rails lengthwise. There were no crossties running perpendicular to the rails. The rails were placed eight or nine feet apart, a timber laid from one rail to the other, and a carpenter's level used to level the rails on the east-west line. The rails were also leveled on the north-south line.

When the trash racks were set in place, the spreader braces cut to measurement were placed between them; then a wire was placed between the racks and tightened to pull the racks up snug against the braces. The braces were snug. The racks were wired at each end with pegs down in the ground and double strand number nine wire. At the southeast end of the bank of eight, the wire was down to the end of the rail rather than to a pin in the ground. All the other end wires ran to a pin in the ground.

Lake Charles Electric Company did not have anything to do with the trash racks after they were set up until January 26.

The first thing he noticed when he arrived at the racks on January 26, was that the braces were removed from the racks. He asked, "Who moved the braces"? Mr. Carroll finally replied, "I wouldn't bother too much about that; they can be put back."

In reblocking the racks, crossties seven by nine and six by eight, around eight feet long, were placed under the racks. They could be placed under the racks while the racks still rested on the rails. Mr. York and Mr. Crosby [fol. 165] were placing the crossties on the inside of the rails. The racks were then raised so that they cleared the rail by about one-half an inch. He was placing the final blocking between the rack and the tie while the men were holding the rack up off the rail with the pry bar. He would then get down where he could see under the rack to see that the rail was clear of the rack. The shimming placed on top of the crossties was four to six inches wide and sixteen to twenty inches long. Each piece was a little longer than the base of the rack.

At the time of the accident rack number three, numbering from the south, and the remaining five racks north of that in the bank of eight had been raised on the west side. At the time of the accident he was sitting between racks number two and three. He had checked the clearance on number three and was waiting for the boys with the pry pole to come around and get the next one. The pry pole was not in contact with the racks at the time of the accident. Mr. Carroll was between the same two racks as Mr.

Hurst, painting number three rack on the south side near the middle. He believes that he had some conversation with Mr. Carroll while they were there between the same two racks.

The pictures, Exhibits 10 and 11, show one of the crossties used for the reblocking protruding south of the southernmost rack of the bank of eight on the west side.

Mr. Jennings and Mr. Sisney were between racks four and five at the time of the accident. He recalls passing by Mr. Jennings. They had already raised racks four and five. When the rack Mr. Jennings was painting on was raised, Mr. Jennings stood on the scaffold and watched it.

(Recross Examination By Mr. Fisher)

When the spreaders were placed and the wire tightened, if there was any slack between the end of the spreader [fol. 166] and the rack, it would pull the rack in. He considered the spreaders important, and he considered it important that the rails be level. The spreaders were not in place when he went there on January 26, and he saw that they were not in place. He did not tell his men to put them in place and went to work on the racks knowing the spreaders were not in place. He does not know who removed the spreaders.

Mr. Carroll was between racks number two and three, working on the ground. Mr. Hurst gave a statement to a Mr. DuVall a few days after January 26. He identified his signature. He stated in the statement that Mr. Carroll was between the third and fourth racks upon a scaffold. He would like to stick to the statement he is making at the trial, it is the one he wants, it is the one that is right.

He, nor anyone else, ever told the painters that the Lake Charles Employees were working on the eight rack row.

All eight racks fell simultaneously.

Due to the unlevelness of the ground, on some racks it took more shims on top of the crossties than on others. It was not necessary to use a level in the reblocking. One was used the first time the racks were set up but not this time.

(Redirect Examination By Mr. Jennings)

He is forty-three years old and has had seventeen years experience in construction work.

Each rack was lifted approximately one-half inch.

In the statement referred to on cross-examination, he stated that, "As I recall Carroll was between the third and fourth racks from the end fartherest from the dam and up on a scaffold." He stated in his statement and he states again at the trial that Mr. Carroll was between the same two racks that he was between.

[fol. 167] Defendant's Exhibit No. 1.

Defendant's Exhibit No. 1 is a certificate of insurance issued by St. Paul-Mercury Indemnity Company at the request of Lake Charles Electric Company, dated January 28, 1952, certifying that Harry B. Hogan, doing business as Hogan Painting Company, had been issued a policy of workmen's compensation insurance in conformance with the compensation law of the State of Missouri for the period 10/31/51 to 10/31/52.

Defendant's Exhibit No. 2.

Defendant's Exhibit No. 2 is a certificate of insurance issued by St. Paul-Mercury Indemnity Company at the request of Lake Charles Electric Company, dated January 30, 1952, certifying that Harry B. Hogan, doing business as Hogan Painting Company, had been issued a policy of insurance for workmen's compensation coverage in conformance with the compensation law of the State of Missouri and Arkansas for the period from 10/31/51 to 10/31/52.

Stipulation.

It was stipulated by and between counsel for all parties that prior to October 10, 1953, counsel for defendant transmitted to Mr. Riffel and he in turn transmitted to Mr.

Fisher a proposed stipulation which said, in effect, that Virgil Carroll was receiving compensation under the Missouri compensation law. The proposed stipulation was not executed, but it was transmitted to Mr. Riffel and to Mr. Fisher prior to October 10 and request was made that they so stipulate it.

[fol. 168] (Docket Entries in Carroll Case, Civil No. 352)

United States District Court, Western District of Arkansas, Harrison Division.

Virgil G. Carroll, Plaintiff,
No. 352 vs. Civil Action
M. Lanza, d/b/a Lake Charles Elec. Co., Defendant,

Harry B. Hogan, d/b/a Harry B. Hogan Painting Company and Saint Paul-Mercury Indemnity Company, Intervenors as Plaintiffs.

3-20-53 Petition for Removal filed.
Bond and Certificate filed.

3-26-53 Answer filed.

6-13-53 Motion for leave to intervene as plffs filed by Harry B. Hogan and Saint Paul-Mercury Indemnity Company.

6-27-53 Order allowing Harry B. Hogan d/b/a Harry B. Hogan Painting Co., and Saint Paul-Mercury Indemnity Company to intervene as plffs. Order filed. Notice of entry of order to counsel. Copy of notice filed.

8-31-53 Pre-trial conference.

Order consolidating Civil 352, 353 and 356. Counsel not insisting on doctrine of Res Ipsa Loquitor but stating that cause would be tried upon allegation of negligence as alleged in Civil 356. Order filed.

9- 1-53 Order striking setting of Civil Actions 352, 353 and 356 at September, 1953, term at Harrison; counsel having agreed to try these consolidated actions to the court at Fort Smith, at some later date. Order filed. Copy of order to counsel. Copy of transmittal notice filed.

10-16-53 Deposition of plff., Virgil G. Carroll, filed by deft.

Motion for summary judgment, with memorandum of authorities attached, filed by deft.

10-27-53 Motion for Production of Documents filed by attys for deft Lanza.

Memorandum in Support of Motion for Production of Documents filed.

10-24-53 Brief in opposition to motion for summary judgt., with exhibits attached, filed by plff.

11- 5-53 Trial to court. Deft's motion for summary judgment as filed in Civil 352 is overruled. Proceedings postponed until tomorrow morning at 9 o'clock.

11- 6-53 Trial continues. Deft moves court for judgment in his favor in each of the three cases, but motion overruled.

Case submitted and taken under advisement by the court.

[fol. 169]

11-13-53 Findings of Fact and Conclusions of Law filed.

Judgment in favor of plff against deft in sum of $18,000 and costs, and declaring first lien in favor of plff and intervenors on two thirds of net proceeds, etc. Order filed. Copy of order mailed to counsel.

12-10-53 Notice of appeal filed by deft. Copy of notice to counsel for plff and intervenors.

12-17-53 Supersedeas bond in sum of $20,000, approved by Judge, filed.

1- 6-54 Motion for extension of time to file record and docket appeal filed by deft.

Order extending time for deft to file record and docket appeal to February 20, 1954. Order filed.

2- 9-54 Designation of contents of Record on Appeal filed by deft.

Statement of Points filed by deft.

Copy of Reporter's transcript filed.

[fol. 170] (Docket Entries in Jennings Case, Civil No. 353)

United States District Court, Western District of Arkansas, Harrison Division.

Paul A. Jennings, a Minor, by O. E. Jennings, His Next Friend, Plaintiff,
No. 353 vs. Civil Action
M. Lanza, d/b/a Lake Charles Electric Co., Defendant,

Harry B. Hogan, d/b/a Harry B. Hogan Painting Company and Saint Paul-Mercury Indemnity Company, Intervenors as Plaintiffs.

3-20-53 Petition for Removal filed.
Bond and Certificate filed.

3-26-53 Answer filed.

6-13-53 Motion for leave to intervene as plffs filed by Harry M. Hogan and Saint Paul-Mercury Indemnity Company.

6-27-53 Order allowing Harry B. Hogan, d/b/a Harry B. Hogan Painting Company and Saint Paul-Mercury Indemnity Company to intervene as plffs. Order filed.

8-31-53 Pre-trial conference.

Order consolidating Civil 352, 353 and 356.

Counsel not insisting on doctrine of Res Ipsa Loquitor but stating that cause would be tried upon allegation of negligence as alleged in Civil 356. Order filed.

9- 1-53 Order striking trial setting of Civil Actions 352, 353 and 356 at September, 1953 term at Harrison; counsel having agreed to try these consolidated actions to the court at Fort Smith, at some later date. Order filed. Copy of order mailed to counsel. Copy of transmittal notice of order filed.

10-16-53 Deposition of plff, Lonnie Sisney, filed by deft.

Motion for judgment on the pleadings or summary judgment, with memorandum of authorities attached, filed by deft.

Order overruling deft's motion for judgment on the pleadings or for summary judgment, Order filed. Notice of entry of order to counsel. Copy of notice filed.

11- 5-53 Trial to court. Deft's motion for summary judgment as filed in Civil 352 is overruled. Proceedings postponed until tomorrow morning at 9 o'clock.

11- 6-53 Trial continues. Deft moves court for judgment in his favor in each of the three cases, but motion overruled. Case submitted and taken under advisement by the court.

[fol. 171]

11-13-53 Findings of fact and conclusions of law of the Court filed.

Judgment in favor of plff against deft in sum of $6,000 and costs, and declaring first lien in favor of plff and intervenors on two-thirds of net proceeds, etc. Order filed. Copy of order mailed to counsel.

12-10-53 Notice of appeal filed by deft. Copy of notice to counsel for plff and intervenors. Copy of letter of transmittal filed.

1- 6-54 Motion for extension of time to file record and docket appeal filed by deft.

Order extending time for deft to file record and docket appeal to February 20, 1954. Order filed. Notice of entry of order to counsel. Copy of notice filed.

2- 9-54 Designation of Contents of Record on Appeal filed by deft.

Statement of Points filed by deft.

Copy of Reporter's transcript filed.

[fol. 172] (Docket Entries in Saint Paul-Mercury Indemnity Company Case, Civil No. 356)

United States District Court, Western District of Arkansas, Harrison Division.

Saint Paul-Mercury Indemnity Company, Harry B. Hogan, d/b/a Harry B. Hogan Painting Company and Lonnie Sisney, Plaintiffs,

No. 356 vs. Civil Action

M. Lanza, d/b/a Lake Charles Electric Company, Defendant.

6-13-53 Complaint filed.

Summons issued, with copy, and with copy of complaint, del. to Marshal at Fort Smith on 6/17/53 for service.

6-27-53 Return of summons as unexec., filed.

7-18-53 Answer of deft filed by Alston Jennings.

8-31-53 Pre-trial conference.

Order consolidating Civil 352, 353 and 356. Counsel not insisting on doctrine of Res ipsa Loquitor but stating that cause would be tried upon allegation of negligence as alleged in Civil 356. Order filed.

9- 1-53 Order striking trial setting of Civil Actions 352, 353 and 356 at September, 1953 term at Harrison; counsel having agreed to try these consolidated actions to the court at Fort Smith, at some later date. Order filed. Copy of order mailed to counsel. Copy of transmittal notice filed.

10-16-53 Deposition of plff, Lonnie Sisney, filed by deft.

Motion for judgment on the pleadings or summary judgment, with memorandum of authorities attached, filed by deft.

Order overruling deft's motion for judgment on the pleadings or for summary judgment. Order filed. Notice of entry of order to counsel. Copy of notice filed.

11- 5-53 Trial to court. Deft's motion for summary judgment as filed in Civil 352 is overruled. Proceedings postponed until tomorrow morning at 9 o'clock.

11- 6-53 Trial continues. Deft moves court for judgment in his favor in each of the three cases, but motion overruled. Case submitted and taken under advisement by the court.

11-13-53 Findings of Fact and Conclusions of Law of Court filed.

Judgment in favor of plffs in sum of $22,500 and costs, and declaring plff Sisney entitled to amt. recovered over the amt. other plffs have paid or are liable for in compensation, etc. Order filed. Copy of order mailed to counsel.

[fol. 173]

12-10-53 Notice of appeal filed by deft.
Copy of notice to counsel for plffs.

12-17-53 Supersedeas Bond in sum of $25,000, approved by Judge, filed.

1- 6-54 Motion for extension of time to file record and docket appeal to February 20, 1954. Order filed. Notice of entry of order to counsel. Copy of notice filed.

2- 9-54 Designation of Contents of Record on appeal filed by deft.

Statement of Points filed by deft.

Copy of Reporter's transcript filed.

[fol. 135] In United States Court of Appeals for the Eighth Circuit

No. 15,016

M. Lanza, Doing Business as Lake Charles Electric Company, Appellant

vs.

Virgil G. Carroll and Harry B. Hogan, Doing Business as Harry B. Hogan Painting Company, and Saint Paul-Mercury Indemnity Company, Appellees

Appeal from the United States District Court for the Western District of Arkansas

No. 15,017

M. Lanza, Doing Business as Lake Charles Electric Company, Appellant

vs.

Paul A. Jennings, a Minor, by O. E. Jennings, His Next Friend, and Harry B. Hogan, Doing Business as Harry B. Hogan Painting Company, and Saint Paul-Mercury Indemnity Company, Appellees

Appeal from the United States District Court for the Western District of Arkansas

No. 15,018

M. Lanza, Doing Business as Lake Charles Electric Company, Appellant

vs.

Saint Paul-Mercury Indemnity Company, Harry B. Hogan, Doing Business as Harry B. Hogan Painting Company, and Lonnie Sisney, Appellees

Appeal from the United States District Court for the Western District of Arkansas

[fol. 136] Alston Jennings (Bruce H. Shaw was with him on the brief), for Appellant.

Shields M. Goodwin and Harold J. Fisher (Allen, Woolsey & Fisher, Arthur N. Wood, and Goodwin & Riffel were on the brief), for Appellees.

OPINION—July 30, 1954

Before GARDNER, Chief Judge, WOODROUGH and THOMAS, Circuit Judges.

THOMAS, Circuit Judge.

These three cases were consolidated for trial in the district court, tried to the court without a jury, judgments were entered in each case for plaintiffs, and defendant appeals. The actions are all for damages for personal injuries to employees of a subcontractor, and Nos. 15,017 and 15,018 present one common question, namely, may a prime contractor be held liable for damages as a "third-party" within the meaning of the Arkansas statute (§ 81-1340, Ark. Stats., 1947, 1951 Supp.) in an action brought by an employee of the subcontractor to recover damages for personal injuries sustained while at work on the project covered by the subcontract? No. 15,016 presents the question whether the rights of the parties are determined by the laws of Arkansas or the laws of Missouri for damages for an injury sustained in the same accident as were the injuries complained of in Nos. 15,017 and 15,018.

The accident in which the injuries complained of arose occurred in Arkansas on January 26, 1953. The actions in the Carroll case, No. 15,016, and the Jennings case, No. 15,017, were brought in the state court of Arkansas and removed to the district court on the ground of diversity. [fol. 137] The Saint Paul-Mercury Indemnity Company case, No. 15,018, was brought in the federal district court in the first instance, jurisdiction being predicated on diversity of citizenship.

The defendant Lanza is a citizen of Louisiana. The plain-

tiffs Hogan and Carroll are both citizens and residents of Missouri. Jennings and Sisney are citizens of Arkansas. The Indemnity Company is a Delaware corporation and carries the workmen's compensation insurance on Hogan for the benefit of his employees in both Missouri and Arkansas.

Carroll was a foreman and a regular employee of Hogan and had been for several years before the circumstances involved in this case occurred.

The defendant Lanza had a contract with the United States Government in connection with the construction of the Bull Shoals dam in Baxter County, Arkansas. On January 22, 1952, Hogan entered into a contract with Lanza, by the terms of which he agreed to furnish all labor and material and to do all the painting required by the Lanza contract. But there was a special contract for doing the job involved in these cases. On November 7, 1952, Hogan submitted a bid to Lanza by letter to paint 18 "trash racks", saying "After racks have been set in upright position and arranged so as to be accessible for painting, all areas . . . are to be given three coats of Coal Tar Paint as specified by Army Engineers . . . " The offer was accepted on November 14, 1952.

A "trash rack" consists of a metal frame approximately 13 feet long, . . feet high and 12 inches wide. Inside the frame are four cross bars parallel to the ground and about 2 feet apart. Inside the frame there are, also, 25 steel fins, each of which is about 10 feet long, 5 inches wide, and [fol. 138] seven-eighths of an inch thick. When the rack is in an upright position the fins are perpendicular to the ground and approximately the height of the rack. The fins in each rack weighed about 4,000 pounds and the remainder of the rack about 1,400 pounds, so that each rack weighed approximately 5,400 pounds.

In November, 1952, Lanza's employees delivered the racks to the place where they were to be painted south of the Bull Shoals Dam on the east side of the river. At first they were stacked on the ground in piles of three racks each, and while they were in that position Carroll, Jennings and Sisney, employees of Hogan, the subcontractor, painted the outer surface of the racks and some of the fins.

Thereafter defendant Lanza's employees set the racks in an upright position to be painted by Hogan's employees.

When the racks were first set up to be painted they were placed on parallel metal railroad rails resting on wooden planks on the ground. The racks were placed about three feet apart and held in place by spreader braces. Ten racks were set up in a row and 8 racks in a parallel row with an aisle about 4 feet wide between them. The racks in each row were attached to each other by braces and the end racks were supported by two guy wires attached to metal pins in the ground. All of this work was done by Lanza's employees and after it was completed Hogan's employees proceeded with the painting.

The railroad rails upon which the racks had been placed belonged to the United States government, and upon its request Lanza's employees undertook on January 26, 1953, to remove the rails and to substitute for them railroad ties. The braces were removed and by the use of pry poles they undertook to lift the racks up slightly to remove the rails and to place in their stead the railroad ties. The spreader [fol. 139] braces were first removed and then the work of substitution proceeded. While this work was going on Hogan's employees continued painting on the 8-rack row.

The ground on which the racks were placed was filled with dirt and was soft and wet at the time.

About 11:30 a.m. one of the guy wires on the 8-rack row broke and all the racks fell; and Carroll, Jennings and Sisney were severely injured. The court found that they did not know that Lanza's employees had begun work on the 8-rack row at the time.

The states of Missouri and Arkansas both have Workmen's Compensation laws. The Saint Paul-Mercury Indemnity Company is the workmen's compensation insurer for the Harry B. Hogan Painting Company in connection with the injury suffered by Virgil G. Carroll when the trash racks fell. The court entered orders permitting Hogan and the Indemnity Company to intervene as plaintiffs in the cases brought by Carroll and Jennings. All the appellees, Carroll, Jennings and Sisney, have been paid workmen's compensation benefits by the Indemnity Company, Jennings and Sisney were paid benefits under the laws of Arkansas.

Carroll was paid benefits for 34 weeks until October 10, 1953, under the Missouri law. On that date he requested that his benefits be paid under the law of Arkansas, and they have been paid to him since then under that law.

In his answers to the three actions Lanza denied that the employees of Hogan were injured by reason of his negligence or that of his employees, and alleged that Hogan's employees were guilty of contributory negligence or that they assumed the risk of the injuries suffered by them. Prior to the trial Lanza filed motions for summary judgment in each case on the ground that the remedies [fol. 140] provided by the workmen's compensation acts were exclusive. The motions were overruled by the trial court. At the conclusion of plaintiffs' evidence the motions were renewed and were again overruled. After the conclusion of the trial judgment was entered in favor of the Indemnity Company, Hogan and Sisney for $22,500; in favor of Carroll for $18,000; and in favor of Jennings in the sum of $6,000, from which judgments Lanza has appealed.

Appellant Lanza contends here:

1. That the remedies provided by the Arkansas Workmen's Compensation Act are exclusive, and that appellant is entitled to judgment as a matter of law in all three cases;

2. That the remedies provided by the Missouri law are exclusive, and that appellant is entitled to judgment in the Carroll case as a matter of law; and

3. That it cannot be consistently held that appellant was negligent and that Carroll, Jennings and Sisney were free of contributory negligence.

It is conceded by all parties that the Workmen's Compensation law of Missouri is exclusive and that Carroll who was employed in Missouri and who accepted 34 payments under that law could not maintain his action unless his election on October 10, 1953, to receive his compensation benefits under the Arkansas law is sufficient to sustain the judgment in his favor.

The Arkansas statute, § 81-1304, Ark. Stat. 1947 (1951 Supp.), provides also that "The rights and remedies herein granted to an employee subject to the provisions of this

act, on account of injury or death, shall be exclusive of all other rights and remedies of such employee. . . . "

[fol. 141] It is contended by appellees, and it was held by the court, that Lanza was liable to them as a "third party" under § 81-1340, Ark. Stats. 1947 (1951 Supp.), which provides:

"*Third-Party Liability.*—(a) *Liability Unaffected.* (1) The making of a claim for compensation against any employer or carrier for the injury or death of an employee shall not affect the right of the employee, or his dependents, to make claim or maintain an action in court against any third-party for such injury, but the employer or his carrier shall be entitled to reasonable notice and opportunity to join in such action. If they, or either of them, join in such action they shall be entitled to a first lien upon two-thirds of the net proceeds recovered in such action that remain after the payment of the reasonable cost of collection, for the payment to them of the amount paid and to be paid by them as compensation to the injured employee or his dependents.

* * * * * * *

"(b) *Subrogation.* An employer or carrier liable for compensation under this act for the injury or death of an employee shall have the right to maintain an action in tort against any third-party responsible for such injury or death. After reasonable notice and opportunity to be represented in such action has been given to the compensation beneficiary, the liability of the third-party to the compensation beneficiary shall be determined in such action as well as the third-party's liability to the employer and carrier. . . ."

The primary obligation of the employer to provide compensation for his employees is found in § 81-1305 Ark. Stats. 1947 (1951 Supp.), as follows:

"*Liability for Compensation.*—Every employer shall secure compensation to his employees and pay or provide compensation for their disability or death from any injury arising out of and in the course of employment, without regard to fault as a cause of such injury; . . . . The pri- [fol. 142] mary obligation to pay compensation is upon the employer and the procurement of a policy of insurance by

an employer to cover the obligation in respect to this act shall not relieve him of such obligation."

It is the contention of the appellant that he, Lanza, being in this case the prime contractor, is not a "third-party" within the meaning of § 81-1340 supra, and in support of this contention he cites § 81-1306, Ark. Stats. 1947 (1951 Supp.), which provides:

"*Subcontractors.*—Where a subcontractor fails to secure compensation required by this act, the prime contractor shall be liable for compensation to the employees of the subcontractor.

"Any contractor or his insurance carrier who shall become liable for the payment of compensation on account of injury to or death of an employee of his subcontractor may recover from the subcontractor the amount of such compensation paid or for which liability is incurred. The claim for such recovery shall constitute a lien against any moneys due or to become due to the subcontractor from such prime contractor. A claim for recovery, however, shall not affect the right of the injured employee or the dependents of the deceased employee to recover compensation due from the prime contractor or his insurance carrier."

Clearly Lanza is not liable in this proceeding if § 81-1304 of the Arkansas statute, supra, is applicable. But the court found that that statute is not applicable to the situation because Lanza is liable as a "third-party" under § 81-1340, supra.

Before discussing the applicable law involved in appellant's points 1 and 2, supra, we observe that we have reviewed the record and have concluded that the court's findings that the negligence of Lanza's employees was the cause of the accident resulting in the injuries complained of and that the injured men, Carroll, Jennings and Sisney, [fol. 143] were not guilty of contributory negligence as a matter of law are supported by substantial evidence, and, therefore, we cannot hold that such findings are "clearly erroneous" within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A. It was Lanza's employees who were engaged in removing the railroad rails and placing the railroad ties under the racks when the ac-

cident occurred. They had been working on the 10-rack row and the injured painters were at work on the 8-rack row when, without warning the painters, Lanza's employees started work on the 8-rack row. Their negligence in placing too great a strain on the guy wire caused the accident.

To support his contention that the remedies provided by the Arkansas Workmen's Compensation Act are exclusive, and that he is entitled to judgment as a matter of law, appellant relies upon § 81-1306 of the Arkansas statutes, supra, which provides that when a subcontractor fails to secure compensation required by the act the prime contractor shall be liable to such employees; and that in such a case the prime contractor may recover from his subcontractor the amount of such compensation so paid or for which liability is incurred. In this instance Hogan was the actual employer of the injured employees, and Lanza was not the statutory employer because it is without dispute in the record that Hogan had compensation insurance covering the appellees at the time they were injured.

The questions presented here were directly involved in the case of *Anderson et al.* v. *Sanderson & Porter et al.*, 8 Cir., 146 F.2d 58; and we there considered the amendment to the Constitution of Arkansas authorizing the legislature to enact Workmen's Compensation laws and the laws enacted pursuant thereto and, in the absence of any decision of the Supreme Court of Arkansas, this court held that in [fol. 144] such a case as this an injured employee of a subcontractor could recover against a prime contractor for personal injuries resulting from the negligence of the prime contractor. And attention was directed to the provision of the Amendment to the Constitution wherein it is provided:

"The General Assembly shall have power to enact laws prescribing the amount of compensation to be paid by employers for injuries to or death of employees, and to whom said payment shall be made. It shall have power to provide the means, methods, and forum for adjudicating claims arising under said laws, and for securing payment of same. Provided, that otherwise no law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property; and in case of death from such injuries the right of action shall survive, and

the General Assembly shall prescribe for whose benefit such action shall be prosecuted."

The opinion of this court in the *Anderson* case, supra, was rendered January 4, 1945, and no decision of the Supreme Court of Arkansas has since held to the contrary.

Appellant, while admitting the applicability of the Anderson decision, argues that it has been overruled by this court in the case of *Huffstettler* v. *Lion Oil Co.*, 8 Cir., 208 F.2d 549; and "if it has not, it ought to be overruled in the light of the Arkansas decisions subsequent to it", referring to *Hobbs-Western Company* v. *Craig*, 209 Ark. 639, 192 S.W.2d 116; *Hobbs-Western Company* v. *Morris*, 212 Ark. 105, 204 S.W.2d 889; and *Brothers* v. *Dierks Lumber & Coal Co.*, 217 Ark. 632, 232 S.W.2d 646.

In making this argument it is evident that appellant has overlooked certain rules applicable to appellate reviews. The rules referred to were stated briefly by this court in *Clarke Hybrid Corn Company, Inc.*, v. *Stratton Grain Co.*, [fol. 145] decided June 29, 1954 (not yet published in the Federal Reporter), as follows:

"One of them [the rules] is that the prevailing party is entitled to have the evidence viewed in the aspect most favorable to it, and to have the benefit of all reasonable inferences deducible therefrom. *Cleo Syrup Corporation* v. *Coca-Cola Co.*, 8 Cir., 139 F.2d 416, 418.

"A second rule is that this Court will not retry issues of fact or substitute its judgment for that of the trial court respecting such issues. *Cleo Syrup Corporation* v. *Coca-Cola Co.*, supra, 139 F.2d 416, 417-418; *Pendergrass* v. *New York Life Insurance Co.*, 8 Cir., 181 F.2d 136; *Noland* v. *Buffalo Insurance Co.*, 8 Cir., 181 F.2d 735, 738.

"A third rule is that the burden of demonstrating error is upon the appellant, and that in cases controlled by local law this Court will accept the considered views of the trial judge as to the applicable law unless convinced that his views are erroneous. *Western Casualty & Surety Co.* v. *Coleman*, 8 Cir., 186 F. 2d 40, 43; *Kimble* v. *Willey*, 8 Cir., 204 F. 2d 238, 243."

See, also, *Russell* v. *Turner*, 8 Cir., 148 F. 2d 562, 564; *Buder* v. *Becker*, 8 Cir., 185 F. 2d 311; *Hartford Accident &*

Indemnity Co. v. *Federal Deposit Ins. Corp.*, 8 Cir., 204 F. 2d 933, 936.

It will be observed also that Honorable John E. Miller, judge in the Western District of Arkansas, before whom this case was tried, is the same judge before whom the *Huffstettler* case was tried; and his opinions in both cases disclose that he carefully reviewed the Arkansas statutes and decisions. See his findings and opinion in the *Huffstettler* case in 110 F. Supp. 222, and in this case in 116 F. Supp. 491.

The statutes of Arkansas and the cases cited above sustain the contention of the appellees also that the remedies [fol. 146] provided by the Arkansas Workmen's Compensation act are exclusive only where the employer-employee relationship exists.

Appellent's second contention is that the remedies provided by the Missouri Workmen's Compensation Act are exclusive, and that appellant is entitled to a judgment as a matter of law in No. 15,016 the *Carroll* case.

Both Hogan and Carroll are citizens of Missouri, and the contract of employment between them was entered into in Missouri. Section 3300 of the Revised Statutes of Missouri, 1929, provides:

"Every employer and every employee, except as in this chapter otherwise provided, shall be conclusively presumed to have elected to accept the provisions of this chapter and respectively to furnish and accept the compensation as herein provided, unless prior to the accident he shall have filed with the commission a written notice that he elects to reject this chapter."

And the Supreme Court of Missouri, construing this statute has held that an employee of a subcontractor cannot sue the general contractor as a third-party and at the same time collect compensation from his immediate employer when the injury is within the Missouri Workmen's Compensation Act. See *Bunner* v. *Patti, et al.*, 343 Mo. 274, 121 S. W. 2d 153; *New Amsterdam Casualty Co.* v. *Boaz-Kiel Constructio Co.*, 8 Cir., 115 F. 2d 950.

The evidentiary facts with perhaps one exception are not in dispute. The accident in which Carroll was injured oc-

curred in Arkansas January 26, 1953. On March 2, 1953, he filed his complaint in this case. He was paid workmen's compensation under the Missouri law at the rate of $30 each week for 34 weeks until October 10, 1953. Prior to that date counsel for appellant proposed a stipulation be ex-
[fol. 147] ecuted showing that payments had been made under Missouri law. The stipulation was not executed by Carroll and his attorney. In October, 1953, Carroll was advised by his attorney, Mr. Fisher, that he had a right to elect to take compensation under the Arkansas law at the rate of $25 a week instead of $30 a week under the Missouri law. Upon Mr. Fisher's suggestion he elected to do so. Thereafter he received compensation payments under the Arkansas law.

Hogan and the Indemnity Company were permitted to intervene and to join with Carroll as plaintiffs and to be awarded a lien upon two-thirds of the net proceeds recovered in the action. And the judgment from which this appeal was taken awarded to Carroll the sum of $18,000 with costs and established a lien thereon in favor of Hogan and the Indemnity Company on two-thirds of the net proceeds of said judgment for the payment to them of the amounts paid and to be paid as compensation to Carroll.

In the *Carroll* case, No. 15,016, the question for determination is whether the court erred in holding that Carroll had a right to maintain this common law action under the Arkansas act or whether the action is barred by Missouri law. As observed supra, under the Missouri law the action is barred. Carroll did not file a notice with the Commission in Missouri electing to reject the Missouri law. Section 3300, Mo. Stat. Ann., 1929; *Hope* v. *Barnes Hospital*, 227 Mo. Ap. 1055, 55 S. W. 2d 319. And the Missouri act applies to injuries received outside the state under a contract of employment made in the state. Section 3310, Mo. Stat. Ann.; *Hungate* v. *Hudson*, Mo., 169 S.W. 2d 682.

Of course, as the court held, the state in which the accident occurred may ordinarily apply its own Workmen's Compensation laws to accidents occurring within the state. [fol. 148] *Pacific Employers Insurance Co.* v. *Industrial Accident Commission*, 306 U.S. 493; *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U.S. 469, 476. And Arkansas applies

the law of the place where the accident occurs in determining whether a person has a common law right of action.

Citing the foregoing authorities and others, the court said: "The Court feels that the public policy of Arkansas favoring common law actions for damages to persons and property, and favoring the application of the law of the place of the injury precludes the application of the bar of the Missouri Act in this case."

But the fact remains that Carroll, as a matter of Missouri law, "elected" to come within the coverage of the Missouri law and to recover his compensation under that law. The question, therefore, is whether, having accepted the payments of $30 a week under the Missouri law, he could "change his mind" and elect to come under the Arkansas law, accept $25 a week thereafter, and maintain this third-party action under the Arkansas law. The court concluded that he could do so because "At the time he was receiving payments under the Missouri Act he did not know that he had the right to recover payments under the Arkansas Act, nor did he know that the payments were, in fact, being made under the Missouri Act."

In making this last finding, the court apparently overlooked Carroll's testimony in his deposition taken at the request of appellant on August 27, 1953, in which he testified that he was receiving workmen's compensation under the Missouri Workmen's Compensation Act.

It was recognized by the court and by the parties that the full faith and credit clause of the Constitution must be considered in this case. In the opinion of the court it is [fol. 149] said: "If the decision of the Supreme Court in the case of *Bradford Electric Light Company, Inc.*, v. *Clapper, Admx.*, 286 U.S. 145, were the last pronouncement of the Court on the question, there is little doubt but that the Full Faith and Credit clause would require the application of the Missouri bar, because the facts in the case were substantially the same as the facts in this case. However, over a period of years the holding and rationale of the *Clapper* case have been so modified by later decisions of the Supreme Court that the extent and force of the opinion is, to say the least, doubtful."

In support of this conclusion the court cites *Pacific Em-*

ployers Insurance Co. v. *Industrial Accident Commission*, 306 U.S. 493; *Alaska Packers Ass'n* v. *Industrial Accident Commission of California*, 294 U.S. 532; *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469, 476; and *Industrial Commission of Wisconsin* v. *McCartin*, 330 U.S. 622.

The court, however, does not cite *Magnolia Petroleum Co.* v. *Hunt*, 320 U.S. 430, in which case the facts more nearly coincide with the facts of the present case than do the facts in the cited cases. In the *Magnolia* case Hunt, a resident of Louisiana, was employed in that state by Magnolia as a laborer in connection with the drilling of oil wells. In the course of his employment he went to Texas where, while working on an oil well, he was injured. He procured workmen's compensation for his injuries under the Texas Workmen's Compensation law. Under the Texas law the award of compensation was final and exclusive, resembling the Missouri law in that respect. Afterward Hunt instituted a proceeding in Louisiana to recover compensation under the laws of that state. He was awarded the relief demanded by the state court of Louisiana, and the Supreme Court reversed. It is difficult to distinguish that case from the pres-[fol. 150] ent one. We are disposed, therefore, to apply what appears to us to be its authority here. See, also, *Ohlhaver* v. *Narron*, 4 Cir., 195 F. 2d 676; and *New Amsterdam Casualty Co.* v. *Boaz-Kiel Construction Co.*, 8 Cir., 115 F. 2d 950.

The result is that the judgment in No. 15,016 is reversed, and the judgments in Nos. 15,017 and 15,018 are affirmed.

[fols. 151-152] In United States Court of Appeals for the Eighth Circuit, September Term, 1953

No. 15016

M. Lanza, Doing Business as Lake Charles Electric Company, Appellant,

vs

Virgil G. Carroll and Harry B. Hogan, Doing Business as Harry B. Hogan Painting Company, and Saint Paul-Mercury Indemnity Company

Appeal from the United States District Court for the Western District of Arkansas

Judgment—July 30, 1954

This cause came on to be heard on the record from the United States District Court for the Western District of Arkansas and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that M. Lanza, doing business as Lake Charles Electric Company have and recover against Virgil G. Carroll and Harry B. Hogan, doing business as Harry B. Hogan Painting Company, and Saint Paul-Mercury Indemnity Company the sum of One Hundred Seventy-five and No/100 ($175) Dollars for his costs in this behalf expended and have execution therefor.

And it is further ordered by this Court that this cause be and the same is hereby remanded to the said District Court for proceedings consistent with the opinion of this Court this day filed herein.

[fols. 153-154] IN UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, SEPTEMBER TERM, 1953

No. 15017

M. LANZA, Doing Business as Lake Charles Electric Company, Appellant,

vs.

PAUL A. JENNINGS, a Minor, by O. E. JENNINGS, His Next Friend, and Harry B. Hogan, Doing Business as Harry B. Hogan Painting Company, and Saint Paul-Mercury Indemnity Company

Appeal from the United States District Court for the Western District of Arkansas

JUDGMENT—July 30, 1954

This cause came on to be heard on the record from the United States District Court for the Western District of Arkansas and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

[fols. 155-156] IN UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, SEPTEMBER TERM, 1953

No. 15018

M. LANZA, Doing Business as Lake Charles Electric Company, Appellant,

vs.

SAINT PAUL-MERCURY INDEMNITY COMPANY, HARRY B. HOGAN, Doing Business as Harry B. Hogan Painting Company, and Lonnie Sisney

Appeal from the United States District Court for the Western District of Arkansas

JUDGMENT—July 30, 1954

This cause came to be heard on the record from the United States District Court for the Western District of Arkansas and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

[fols. 157-158] [File endorsement omitted]

[fol. 159] In United States Court of Appeals

No. 15,016—Civil

M. Lanza, Etc., Appellant,

vs.

Virgil G. Carroll, et al., Appellees

Appellees' Petition for Rehearing—Filed August 16, 1954

Now come Virgil G. Carroll, Harry B. Hogan, doing business as Harry B. Hogan Painting Company, and St. Paul Mercury Indemnity Company, appellees herein, and respectfully petition the Court to grant them a rehearing in this cause and, upon rehearing, to affirm the judgment herein, and, for cause, say:

The Court erred in holding that appellee, Carroll, "as a mat-er of Missouri law, 'elected' to come within the coverage of the Missouri law and to recover his compensation under that law" and that he could not thereafter " 'change his mind' and elect to come under the Arkansas law" (Op., p. 14).

Shields M. Goodwin, Boyle Building, Little Rock, Arkansas, Attorney for Appellees.

[fols. 160-165] Certificate

I, Shields M. Goodwin, attorney for the appellees in this cause, do hereby certify that I have prepared and read the above and foregoing petition for rehearing and also the brief in support thereof, that they are filed in good faith and that they are believed to be meritorious.

This 16th day of August, 1954.

Shields M. Goodwin

[fol. 166] IN UNITED STATES COURT OF APPEALS

No. 15,016

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—August 24, 1954

Petition for rehearing filed by appellees in the above case has been considered by the Court and It is now here Ordered that same be and is hereby denied.

[fol. 167] IN UNITED STATES COURT OF APPEALS, SEPTEMBER TERM, 1953

No. 15,016

[Title omitted]

ORDER STAYING ISSUANCE OF MANDATE—September 2, 1954

On Consideration of the motion of the appellees for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

[fols. 168-169] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 179] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 375

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed November 8, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office - Supreme Court, U. S.
FILED
SEP 28 1954
HAROLD S. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

VIRGIL G. CARROLL, HARRY B. HOGAN, doing business as HARRY B. HOGAN PAINTING COMPANY, and SAINT PAUL-MERCURY INDEMNITY COMPANY ..... *Petitioners*

v. No. 375

M. LANZA, doing business as LAKE CHARLES ELECTRIC COMPANY ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SHIELDS M. GOODWIN
Boyle Building
Little Rock, Arkansas
Attorney for Petitioners

September 25, 1954

PARAGON PRINTING CO., LITTLE ROCK

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

VIRGIL G. CARROLL, HARRY B. HOGAN, doing business as HARRY B. HOGAN PAINTING COMPANY, and SAINT PAUL-MERCURY INDEMNITY COMPANY ..... *Petitioners*

v. No.

M. LANZA, doing business as LAKE CHARLES ELECTRIC COMPANY ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Virgil G. Carroll, Harry B. Hogan, doing business as Harry B. Hogan Painting Company, and Saint Paul-Mercury Indemnity Company, petitioners, pray the court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in the above-entitled cause and the order denying the petition for rehearing therein, and, for cause, show:

OPINIONS OF COURTS BELOW

The opinion of the United States District Court for the Western District of Arkansas, delivered November 13, 1953, upon the rendering of the judgments in this case and in the companion *Jennings* and *Sisney* cases, is reported in 116 F. Supp. 491 and appears on pages 40-69

of the printed record, nine copies of which have been filed.

The opinion of the United States Court of Appeals for the Eighth Circuit has not yet been reported in the Federal Reporter. It appears in the appendix (pp. i-xvi).

JURISDICTION

The date of the judgment sought to be reviewed, which was also the time of its entry, was July 30, 1954 (App., p. xvi).

The date of the order denying the petition for rehearing was August 24, 1954 (App. p. xx).

The date of the order staying the issuance of the mandate was September 2, 1954 (App. p. xxi).

The statutory provision believed to confer on this court jurisdiction to review the judgment in question by writ of certiorari is USCA, Title 28, Section 1254, as amplified by that part of Rule 19(b) of this Court which provides that this Court will, in considering the question whether it should grant a review on writ of certiorari, consider cases in which

> "a court of appeals has rendered a decision in conflict with a decision of another court of appeals on the same matter;
>
> "or has decided an important state or territorial question in a way in conflict with applicable state or territorial law."

The "question presented for review" (*infra*, p. 7) follows the statement of the case.

STATEMENT OF THE CASE

On January 26, 1953, petitioner, Virgil G. Carroll, an employee of petitioner, Harry B. Hogan, doing business as Harry B. Hogan Painting Company, was seriously injured as the result of the negligence of respondent, M. Lanza, doing business as Lake Charles Electric Company (R.94-97). Hogan was an insured subcontractor under Lanza, the general contractor (R.92-93). The accident occurred in Baxter County, Arkansas, where Lanza was engaged in constructing the Bull Shoals Dam (R.5). Hogan carried, with Saint Paul-Mercury Indemnity Company, the other petitioner, a standard workmen's compensation and workmen's liability policy of insurance covering his employees in Missouri and Arkansas (R.93).

Paul A. Jennings and Lonnie Sisney, who were likewise employees of Hogan, were also injured, as the result of the negligence of respondent, at the same time and place as Carroll (R.105-109).

Separate suits against Lanza were brought by Carroll (R.5-7) and Jennings (R.8-10) in the Circuit Court of Baxter County, Arkansas, and removed to the United States District Court for the Western District of Arkansas, and by Sisney in the United States District Court for the Western District of Arkansas (R.12-14). Hogan and the Saint Paul, who had made payments to the injured employees on account of their compensation coverage on them, intervened (R.20-26) or joined (R.12-14) as plaintiffs in these suits for the purpose of asserting their subrogation claims against the recovery, if any, therein.

By agreement, the suits were consolidated for trial by the Court without a jury (R.27). The District Court rendered an exhaustive opinion and made appropriate findings of fact and conclusions of law (R.40-69) when it en-

tered judgments for petitioners against Lanza as follows: In the *Carroll* case, $18,000.00 (R.70-71); in the *Jennings* case, $6,000.00 (R.71-72); and in the *Sisney* case, $22,500.00 (R.72-73).

Lanza appealed, but did not question the amount of any of the judgments (R.73-76, 83-86). The Court of Appeals affirmed the judgments in the *Jennings* and *Sisney* cases (Nos. 15,017 and 15,018 in the District Court), but reversed the judgment in the *Carroll* case (No. 15,016 in the District Court) (Appendix, pp. i-xviii) and denied Carroll's petition for rehearing (Appendix, pp. xix-xx).

Jennings and Sisney were residents of Arkansas (R. 105, 108) and always claimed, and were paid, their compensation benefits under the Arkansas Workmen's Compensation Act (R.23,14). The United States Court of Appeals for the Eighth Circuit had held, in 1945, that a general contractor (as, for example, Lanza in the case now before the Court) was, as to employees of subcontractors carrying workmen's compensation insurance (as, for example, Hogan in this case), a third party who, under Arkansas compensation law, *may be sued* for common law negligence. *Anderson* v. *Sanderson & Porter,* 146 F. 2d 58, 60. That court re-affirmed that doctrine in the Jennings and Sisney cases (Op., pp. vi-xii).

In the *Carroll* case, respondent filed, pursuant to Rule 56(b), a motion for summary judgment in his favor (R. 29-30) on the ground that, since Carroll had accepted compensation benefits for thirty-four weeks (January 26, 1953-October 10, 1953) under the Missouri Workmen's Compensation Act, he thereby "elected" to claim his compensation benefits under that Act, in consequence of which he could not maintain this third-party suit against respondent since, under the Missouri Act (which, as shown

by the opinion of the Court of Appeals in the *Anderson* case (146 F. 2d 60), is very different in this respect from the Arkansas Act), an employee of an insured subcontractor *may not maintain* an action for common law negligence against a general contractor. See *Bunner* v. *Patti*, 343 Mo. 274, 121 S.W. 2d 153, and *New Amsterdam Casualty Co.* v. *Boaz-Kiel Construction Co.*, 8 Cir., 115 F. 2d 950, which are cited in the *Anderson* case (146 F. 2d 60).

All the facts on this issue are undisputed. They are as follows:

Hogan and Carroll were residents of Missouri, and Carroll's contract of employment with Hogan was made in Missouri (R.92,94). Although Carroll never obtained an award from the Missouri Workmen's Compensation Commission and never even filed his claim with that commission (R.98,35-37), Saint Paul-Mercury Indemnity Company, the other petitioner, voluntarily paid compensation benefits to him under the Missouri Workmen's Compensation Act from the time of his injury until October 10, 1953 (R.35-37), and Carroll knew these benefits were being paid to him under the Missouri Act (R.30).

On October 10, 1953, *Carroll learned for the first time that he could have claimed workmen's compensation benefits under the Arkansas Workmen's Compensation Act.* On that very day, he wrote a letter to the Kansas City, Missouri, and Little Rock, Arkansas, offices of the insurance carrier, requesting that his "compensation benefits be computed under the Workmen's Compensation Act of Arkansas instead of the Workmen's Compensation Act of Missouri" and that his "claim be considered a claim under the Arkansas Act" (R.35,32-33). Carroll said, in an affidavit, which was never drawn in question by respondent (R.35):

> "If I had known all along that I had the right to receive compensation benefits under the Workmen's Compensation Act of Arkansas, I would, immediately after I was injured, have requested that these benefits be paid to me under the law of Arkansas instead of under the law of Missouri."

The affidavit of Harold J. Fisher, a Springfield, Missouri lawyer, dated October 20, 1953 (R.36-37), was likewise to the effect that it was not until October 10, 1953, that he advised Carroll of his right to obtain compensation benefits under the Arkansas Act if he so desired. Mr. Fisher also made it plain that Carroll's compensation claim was never filed with the Missouri Commission.

By letter dated October 21, 1953, the Little Rock office of the Saint Paul, in filing the claim with the Arkansas Workmen's Compensation Commission, said, among other things: "We have no objection to Mr. Carroll's election to receive his benefits under the Arkansas Act" (R. 31). The Arkansas Workmen's Compensation Commission promptly accepted the claim and assigned to it a number, as shown by the certificate of Dave Peel, chairman of that commission, dated October 22, 1953 (R.38); and Carroll has been receiving his compensation benefits under the Arkansas Act since that time.

On these facts, the District Court, at the trial on November 5 and 6, 1953, denied Lanza's motion for summary judgment (R.59). The Court reasoned that, since the accident occurred in Arkansas, Carroll could, from the beginning, have claimed compensation benefits under the law of Arkansas, in which event, under the doctrine of the *Anderson* case, he could have successfully maintained this suit; and that he was not thereafter estopped or precluded from renouncing his rights under the Missouri Act and claiming benefits under the Arkansas Act for the

reason that, during all the time that he was receiving benefits under the Missouri Act, he was *unaware* of his rights under the Arkansas Act (R.54-59).

The Court of Appeals took the view that Lanza's motion for summary judgment should have been granted. Overlooking the uncontradicted testimony that Carroll was not aware of his rights under the Arkansas Act while he was receiving compensation benefits under the Missouri Act, it held that Carroll could not maintain this suit for the reason that his acceptance of benefits up to October 10, 1953, under the Missouri Act constituted an election "to come within the coverage of the Missouri law and to recover his compensation under that law" and that he could not thereafter " 'change his mind' and elect to come under the Arkansas law, accept $25 a week thereafter and maintain this third-party action under the Arkansas law" (Op., p. xiv).

This is the decision which petitioners are asking this Court to review on the ground that it is in conflict with decisions of other courts of appeals and of courts of last resort in Arkansas, Missouri and other states.

QUESTION PRESENTED FOR REVIEW

The question presented is whether, under these facts, *all of which are undisputed*, Carroll ever "elected" to claim compensation benefits under the Missouri law.

The Court of Appeals held that he had so elected and that he could not thereafter "change his mind" and claim benefits under the Arkansas Act. Accordingly, since, under the Missouri statute and decisions, an employee of an insured subcontractor may not maintain an action for common-law negligence against a general contractor, the Court reversed the judgment in favor of Carroll and the other petitioners.

Petitioners assert that this holding was erroneous. Specifically, they contend not only that Carroll *did not make an election* until October 19, 1953, but that he necessarily could not have made an election before that time for the compelling reason that, prior to that day, he believed in good faith that he had the right to claim compensation benefits *only under the Missouri Workmen's Compensation Act.*

ARGUMENT

Petitioners respectfully submit that the doctrine of election of remedies, which the Court of Appeals invoked to reverse the judgment in the *Carroll* case, does not apply.

Discussing the question whether the District Court "erred in holding that Carroll had a right to maintain this common law action under the Arkansas law", the Court of Appeals said, among other things (Op., p. xiii):

> "Of course, as the court held, the state in which the accident occurred may ordinarily apply its own Workmen's Compensation laws to accidents occurring within the state. *Pacific Employers Insurance Co.* v. *Industrial Accident Commission*, 306 U.S. 493; *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U.S. 469, 476. And Arkansas applies the law of the place where the accident occurs in determining whether a person has a common law right of action.
>
> "Citing the foregoing authorities and others, the Court said: 'The Court feels that the public policy of Arkansas favoring common law actions for damages to persons and property, and favoring the application of the law of the place of the injury, precludes the application of the bar of the Missouri Act in this case.' "

The Court of Appeals did not take issue with the opinion of the District Court on this point; or, to state it af-

firmatively, the Court of Appeals quite properly agreed with the District Court that Carroll could have claimed his compensation benefits from the beginning under the Arkansas Act and that, if he had done so, he could have successfully maintained this third-party tort action against the respondent, Lanza. This analysis of the reasoning of the Court of Appeals is compelled by the following language which follows that part of its opinion above quoted and which shows that it held against Carroll's right to maintain this suit because he had elected to receive compensation benefits under the Missouri Act and because such a suit cannot be maintained if an employee is receiving benefits under that Act (Op., p. xiv):

> "But the fact remains that Carroll, as a matter of Missouri law, 'elected' to come within the coverage of the Missouri law and to recover his compensation under that law. The question, therefore, is whether, having accepted the payments of $30 a week under the Missouri law, he could 'change his mind' and elect to come under the Arkansas law, accept $25 a week thereafter, and maintain this third-party action under the Arkansas law. The court concluded that he could do so because 'At the time he was receiving payments under the Missouri Act he did not know that he had the right to recover payments under the Arkansas Act, nor did he know that the payments were, in fact, being made under the Missouri Act'.
>
> "In making this last finding, the court apparently overlooked Carroll's testimony in his deposition taken at the request of appellant on August 27, 1953, in which he testified that he was receiving workmen's compensation under the Missouri Workmen's Compensation Act."

It is wholly unimportant that the District Court inadvertently stated that Carroll did not know that his compensation payments (prior to October 10, 1953) were

being made under the Missouri Act. *The only relevant inquiry* is whether, during the time he knew he was receiving compensation benefits under the Missouri Act, he knew that he had the right to claim and receive compensation benefits under the Arkansas Act instead of the Missouri Act if he so desired. If, during that time, he did not know that he had the right to compensation benefits under the Arkansas Act, the law is clear that his acceptance of compensation benefits under the Missouri Act during that period did *not* constitute an election, this for the reason that an election of remedies requires "*a conscious exercise of choice between two remedies which are inconsistent with each other*". Carroll had no such choice until October 10, 1953.

The Court of Appeals noted that "Carroll did not file a notice with the Commission in Missouri electing to reject the Missouri law" (Op., p. xiii), as permitted under Section 3300 of the Revised Statutes of Missouri (1929) which provides as foiows (Op., p. xii):

> "Every employer and every employee, except as in this chapter otherwise provided, shall be conclusively presumed to have elected to accept the provisions of this chapter and respectively to furnish and accept the compensation as herein provided, unless prior to the accident he shall have filed with the commission a written notice that he elects to reject this chapter."

Section 3300 relates, and relates only, to the question whether an employee desires to be a *compensation employee* or a *common law employee*. The provision has no bearing upon the question whether an employee desires to receive compensation payments—if, indeed, he is a compensation employee—under the law of Missouri or under the law of any other state (for example, Arkansas) under

whose workmen's compensation act he might otherwise be entitled to receive benefits.

In other words, the failure of Carroll to file with the Missouri Commission the written notice referred to in the statute means at most that he is a compensation employee, not a common law employee; it does *not* mean that he thereby elected to receive compensation payments *under the Missouri Act.* Whether or not he has made such an election necessarily depends upon the application of the doctrine of election of remedies, wholly uninfluenced by, and separate and apart from, the fact that, by his failure to file the written notice, he became a compensation employee under the law of some state.

Moreover, if, by the above-quoted observation, the Court of Appeals intended to hold that, by Carroll's failure to file the written notice, he thereby made it impossible for the compensation law of Arkansas to be applied to his case, the holding would be in conflict with a number of decisions of this Court typified by *Pacific Employers Insurance Company* v. *Industrial Accident Commission of California,* 306 U.S. 493, 83 L. Ed. 940, 59 S. Ct. 629, wherein it was said (p. 503):

> "Although Massachusetts has an interest in safeguarding the compensation of Massachusetts employees while temporarily abroad in the course of their employment, and may adopt that policy for itself, that could hardly be thought to support an application of the full faith and credit clause which would override the constitutional authority of another state (in that case, California) to legislate for the bodily safety and economic protection of employees injured within it. *Few matters could be deemed more appropriately the concern of the state in which the injury occurs or more completely within its power*" (emphasis supplied).

This disposes of the contention that the full faith and credit clause applies in so far as the Missouri Workmen's Compensation Act is concerned.

(a) *The Decision Is in Conflict with Decisions of Other Courts of Appeals*

The decision that Carroll is precluded from maintaining this suit because he had already "elected" to claim workmen's compensation benefits under the Missouri Act, notwithstanding the undisputed proof that he was not aware of his rights under the Arkansas Act while he was accepting benefits under the Missouri Act, is in conflict with numerous decisions of other courts of appeals.

For example, the Court of Appeals for the Third Circuit, in *Pittsburgh Terminal Cool Corporation* v. *Bennett*, 73 F. 2d 387, 389, said:

> "Under these circumstances, the rule of election as stated above does not apply. *The plaintiff had never had an opportunity to elect. Election involves a choice, and choice presupposes knowledge of alternatives and freedom and opportunity to choose between them.* Election cannot be made between principal and agent until the principal is known, and here it was not known. * * * * * *
>
> The doctrine of election as urged by the defendant does not constitute a defense in this case, and is in consequence immaterial" (emphasis supplied).

Other courts of appeals have likewise emphasized the fact that there can be no election of remedies unless, at the time the election is alleged to have been made, the party had full knowledge of the nature of his inconsistent rights. The following cases are typical of many:

THIRD CIRCUIT: ***Flannery Bolt Company*** v. ***Greenslade,*** 26 F. Supp., 502, 505; affirmed 108 F. 2d

531; certiorari denied 309 U.S. 671, 84 L. Ed. 1017, 60 S. Ct. 615.

FIFTH CIRCUIT: *A. Klipstein & Company* v. *Grant*, 141 F. 72.

NINTH CIRCUIT: *Miles* v. *Lavender*, 10 F. 2d 450, 454.

TENTH CIRCUIT: *Minneapolis National Bank* v. *Liberty National Bank*, 72 F. 2d 434, 436.

This Court has likewise consistently limited the application of the doctrine of election of remedies to cases in which the party against whom it is sought to be invoked had knowledge of his rights and of the facts at the time the election is alleged to have been made. *Robb* v. *Vos*, 155 U.S. 13, 43, 39 L. Ed. 52, 15 S. Ct. 4; *United States* v. *Oregon Lumber Company*, 260 U.S. 290, 295, 67 L. Ed. 261, 43 S. Ct. 100.

(b) *The Decision on This Important State Question Is in Conflict with Applicable State Law*

The facts, as developed by the uncontradicted evidence offered by and on behalf of Carroll, bring this case squarely within the Arkansas rule and Missouri rule that Carroll did not "elect" and necessarily could not have "elected" to accept compensation benefits under the Missouri Act because, while he was receiving them, he did *not* know that he had rights under the Arkansas law. The very day (October 10, 1953) upon which he first learned of his rights under the Arkansas Act, he elected to receive compensation benefits under that Act.

The general rule is stated as follows in 28 C.J.S. 1097:

> "In order to constitute a binding election, the party must, at the time the election is alleged to have been made, have had knowledge of the facts from which the coexisting, inconsistent remedial

> rights arise, since any position taken by a party before knowing all the facts should be classed as a mistake and not as an election."

In *City National Bank* v. *McCann*, 193 Ark. 967, 980, 106 S.W. 2d 195, the Supreme Court of Arkansas had stated the principle as follows:

> "Therefore, the case of *Craig* v. *Meriwether*, 84 Ark. 298, 105 S.W. 585, cited by plaintiffs, is controlling. '*The binding force of an election cannot be predicated upon mere imputed knowledge, for the doctrine is based entirely upon the idea of a conscious exercise of choice between two remedies which are inconsistent with each other.* In order that a person who is put to his election should be concluded by it, two things are necessary: first, a full knowledge of the nature of the inconsistent rights, and of the necessity of electing between them; second, an intention to elect, manifested either expressly or by acts which imply choice and acquiescence'" (emphasis supplied).

The respondent offered no evidence to disprove Carroll's testimony that he was not aware of his rights under the Arkansas Act until October 10, 1953. Under the decision in the *City National Bank* case, the "binding force of an election cannot be predicated upon mere imputed knowledge".

This also is the rule in Missouri. In *Sutorius* v. *Mayor*, 350 Mo. 1235, 170 S.W. 2d 387, 396, the Supreme Court of Missouri said:

> "*Acts done in ignorance of one's legal rights and without knowledge of the facts necessary to a decision do not amount to a binding election where the position of the parties has not changed*" (citing Missouri cases) (emphasis supplied).

In the case at bar, the position of the parties has not changed.

As in Arkansas and Missouri, other state courts have consistently held that there can be no "election" unless the party has knowledge of the facts. For example, in *Stewart* v. *Salisbury Realty & Insurance Company*, 159 N.C. 230, 74 S.E. 736, the Supreme Court of North Carolina said:

> "It seems to be well settled that an election once made, *with knowledge of the facts*, between co-existing, remedial rights, which are inconsistent, is irrevocable and conclusive, irrespective of intent, an deonstitutes an absolute bar to any action, suit or proceeding based upon any remedial right inconsistent with that asserted by the election" (emphasis supplied).

Petitioners have found no authority to the contrary.

(c) *The Magnolia Petroleum Company Case Is Not in Point*

The opinion cites *Magnolia Petroleum Company* v. Hunt, 320 U.S. 430, 88 L. Ed. 149, 64 S. Ct. 208 (p. xv). But the case is not in point. There, the plaintiff, Hunt, who had already "sought and procured in Texas an award of compensation for his injury under its Workmen's Compensation Law" (p. 432), thereafter undertook to obtain compensation for the same injury under the Louisiana Workmen's Compensation Law. This Court properly rejected his claim under the Louisiana law, holding that "the Texas award, being a bar to any further recovery of compensation for respondent's injury, is, by virtue of the full faith and credit clause, exclusive of his remedy under the Louisiana Act" (p. 442).

As was pointed out in the statement of the case at bar (*supra*, p. 5), Carroll never obtained an award of compensation from the Missouri Commission and never even filed his claim with that commission. The *Carroll*

case is therefore clearly distinguishable from the *Magnolia Petroleum Company* case, since there is no act of the Missouri Commission to which full faith and credit can be given.

CONCLUSION

An unfortunate, if not a dangerous, precedent would be established if the opinion in the *Carroll* case should be allowed to stand. It would mean that, in the Eighth Circuit at least, the doctrine of election of remedies can be successfully asserted against a party even though, at the time he availed himself of one remedy, he was wholly unaware of the other and inconsistent remedy and even though he invoked the other remedy promptly upon learning of its existence.

The record and the opinion of both courts below establish Lanza's negligence and Carroll's freedom from negligence in the *Carroll* case to the same extent as they establish Lanza's negligence and Jennings' and Sisney's freedom from contributory negligence in their cases; and yet, as matters now stand, the judgments against Lanza in the *Jennings* and *Sisney* cases are affirmed while the judgment against Lanza in the *Carroll* case is reversed. Surely, petitioners should not be deprived of their recovery in the *Carroll* case merely because he accepted compensation benefits under the Missouri Act at a time when he did not know he had a right to obtain compensation benefits under the Arkansas Act.

The petition should, therefore, be granted and, on writ of certiorari, the judgment of the Court of Appeals should be reversed and the judgment of the District Court affirmed to the end that the decision may be in harmony with decisions of other courts of appeals and with those of state courts.

Respectfully submitted,

SHIELDS M. GOODWIN
Boyle Building
Little Rock, Arkansas
Attorney for Petitioners

September 25, 1954

APPENDIX

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

M. LANZA, doing business as
LAKE CHARLES ELECTRIC COMPANY ..... *Appellant*

v. No. 15,016

VIRGIL G. CARROLL, HARRY B. HOGAN, doing business as HARRY B. HOGAN PAINTING COMPANY, and SAINT PAUL-MERCURY INDEMNITY COMPANY ..... *Appellees*

M. LANZA, doing business as
LAKE CHARLES ELECTRIC COMPANY ..... *Appellant*

v. No. 15,017

PAUL A. JENNINGS, a Minor, by O. E. JENNINGS, his next friend, HARRY B. HOGAN, doing business as HARRY B. HOGAN PAINTING COMPANY, and SAINT PAUL-MERCURY INDEMNITY COMPANY .... *Appellees*

M. LANZA, doing business as
LAKE CHARLES ELECTRIC COMPANY ..... *Appellant*

v. No. 15,018

SAINT PAUL-MERCURY INDEMNITY COMPANY, HARRY B. HOGAN, doing business as HARRY B. HOGAN PAINTING COMPANY, and LONNIE SISNEY ..... *Appellees*

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS

[July 30, 1954.]

Alston Jennings (Bruce H. Shaw was with him on the brief), for Appellant.

Shields M. Goodwin and Harold J. Fisher (Allen, Woolsey & Fisher, Arthur N. Wood, and Goodwin & Riffel were on the brief), for Appellees.

Before GARDNER, Chief Judge, WOODROUGH and THOMAS, Circuit Judges.

THOMAS, Circuit Judge.

These three cases were consolidated for trial in the district court, tried to the court without a jury, judgments were entered in each case for plaintiffs, and defendant appeals. The actions are all for damages for personal injuries to employees of a subcontractor, and Nos. 15,017 and 15,018 present one common question, namely, may a prime contractor be held liable for damages as a "third-party" within the meaning of the Arkansas statute (§ 81-1340, Ark. Stats., 1947, 1951 Supp.) in an action brought by an employee of the subcontractor to recover damages for personal injuries sustained while at work on the project covered by the subcontract? No. 15,016 presents the question whether the rights of the parties are determined by the laws of Arkansas or the laws of Missouri for damages for an injury sustained in the same accident as were the injuries complained of in Nos. 15,017 and 15,018.

The accident in which the injuries complained of arose occurred in Arkansas on January 26, 1953. The actions in the Carroll case, No. 15,016, and the Jennings case, No. 15,017, were brought in the state court of Arkansas and removed to the district court on the ground of diversity.

The Saint Paul-Mercury Indemnity Company case, No. 15,018, was brought in the federal district court in the first instance, jurisdiction being predicated on diversity of citizenship.

The defendant Lanza is a citizen of Louisiana. The plaintiffs Hogan and Carroll are both citizens and residents of Missouri. Jennings and Sisney are citizens of Arkansas. The Indemnity Company is a Delaware corporation and carries the workmen's compensation insurance on Hogan for the benefit of his employees in both Missouri and Arkansas.

Carroll was a foreman and a regular empolyee of Hogan and had been for several years before the circumstances involved in this case occurred.

The defendant Lanza had a contract with the United States Government in connection with the construction of the Bull Shoals dam in Baxter County, Arkansas. On January 22, 1952, Hogan entered into a contract with Lanza, by the terms of which he agreed to furnish all labor and material and to do all the painting required by the Lanza contract. But there was a special contract for doing the job involved in these cases. On November 7, 1952, Hogan submitted a bid to Lanza by letter to paint 18 "trash racks", saying "After racks have been set in upright position and arranged so as to be accessible for painting, all areas . . . are to be given three coats of Coal Tar Paint as specified by Army Engineers . . ." The offer was accepted on November 14, 1952.

A "trash rack" consists of a metal frame approximately 13 feet long, 10 feet high and 12 inches wide. Inside the frame are four cross bars parallel to the ground and about 2 feet apart. Inside the frame there are, also, 25 steel fins, each of which is about 10 feet long, 5 inches wide, and

seven-eighths of an inch thick. When the rack is in an upright position the fins are perpendicular to the ground and approximately the height of the rack. The fins in each rack weighed about 4,000 pounds and the remainder of the rack about 1,400 pounds, so that each rack weighed approximately 5,400 pounds.

In November, 1952, Lanza's employees delivered the racks to the place where they were to be painted south of the Bull Shoals Dam on the east side of the river. At first they were stacked on the ground in piles of three racks each, and while they were in that position Carroll, Jennings and Sisney, employees of Hogan, the subcontractor, painted the outer surface of the racks and some of the fins. Thereafter defendant Lanza's employees set the racks in an upright position to be painted by Hogan's employees.

When the racks were first set up to be painted they were placed on parallel metal railroad rails resting on wooden planks on the ground. The racks were placed about three feet apart and held in place by spreader braces. Ten racks were set up in a row and 8 racks in a parallel row with an aisle about 4 feet wide between them. The racks in each row were attached to each other by braces and the end racks were supported by two guy wires attached to metal pins in the ground. All of this work was done by Lanza's employees and after it was completed Hogan's employees proceeded with the painting.

The railroad rails upon which the racks had been placed belonged to the United States government, and upon its request Lanza's employees undertook on January 26, 1953, to remove the rails and to substitute for them railroad ties. The braces were removed and by the use of pry poles they undertook to lift the racks up slightly remove the rails and to place in their stead the railroad ties. The spreader

braces were first removed and then the work of substitution proceeded. While this work was going on Hogan's employees continued painting on the 8-rack row.

The ground on which the racks were placed was filled with dirt and was soft and wet at the time.

About 11:30 a.m. one of the guy wires on the 8-rack row broke and all the racks fell; and Carroll, Jennings and Sisney were severely injured. The court found that they did not know that Lanza's employees had begun work on the 8-rack row at the time.

The states of Missouri and Arkansas both have Workmen's Compensation laws. The Saint Paul-Mercury Indemnity Company is the workmen's compensation insurer for the Harry B. Hogan Painting Company in connection with the injury suffered by Virgil G. Carroll when the trash racks fell. The court entered orders permitting Hogan and the Indemnity Company to intervene as plaintiffs in the cases brought by Carroll and Jennings. All the appellees, Carroll, Jennings and Sisney, have been paid workmen's compensation benefits by the Indemnity Company. Jennings and Sisney were paid benefits under the laws of Arkansas. Carroll was paid benefits for 34 weeks until October 10, 1953, under the Missouri law. On that date he requested that his benefits be paid under the law of Arkansas, and they have been paid to him since then under that law.

In his answers to the three actions Lanza denied that the employees of Hogan were injured by reason of his negligence or that of his employees, and alleged that Hogan's employees were guilty of contributory negligence or that they assumed the risk of the injuries suffered by them. Prior to the trial Lanza filed motions for summary judgment in each case on the ground that the remedies

provided by the workmen's compensation acts were exclusive. The motions were overruled by the trial court. At the conclusion of plaintiffs' evidence the motions were renewed and were again overruled. After the conclusion of the trial judgment was entered in favor of the Indemnity Company, Hogan and Sisney for $22,500; in favor of Carroll for $18,000; and in favor of Jennings in the sum of $6,000, from which judgments Lanza has appealed.

Appellant Lanza contends here:

1. That the remedies provided by the Arkansas Workmen's Compensation Act are exclusive, and that appellant is entitled to judgment as a matter of law in all three cases;

2. That the remedies provided by the Missouri law are exclusive, and that appellant is entitled to judgment in the Carroll case as a matter of law; and

3. That it cannot be consistently held that appellant was negligent and that Carroll, Jennings and Sisney were free of contributory negligence.

It is conceded by all parties that the Workmen's Compensation law of Missouri is exclusive and that Carroll who was employed in Missouri and who accepted 34 payments under that law could not maintain his action unless his election on October 10, 1953, to receive his compensation benefits under the Arkansas law is sufficient to sustain the judgment in his favor.

The Arkansas statute, § 81-1304, Ark. Stat. 1947 (1951 Supp.), provides also that "The rights and remedies herein granted to an employee subject to the provisions of this act, on account of injury or death, shall be exclusive of all other rights and remedies of such employee. . . ."

It is contended by appellees, and it was held by the court, that Lanza was liable to them as a "third party" under § 81-1340, Ark. Stats. 1947 (1951 Supp.), which provides:

"*Third-Party Liability.*—(a) *Liability Unaffected.* (1) The making of a claim for compensation against any employer or carrier for the injury or death of any employee shall not affect the right of the employee, or his dependents, to make claim or maintain an action in court against any third-party for such injury, but the employer or his carrier shall be entitled to reasonable notice and opportunity to join in such action. If they, or either of them, join in such action they shall be entitled to a first lien upon two-thirds of the net proceeds recovered in such action that remain after the payment of the reasonable cost of collection, for the payment to them of the amount paid and to be paid by them as compensation to the injured employee or his dependents.

* * * * * * *

"(b) *Subrogation.* An employer or carrier liable for compensation under this act for the injury or death of an employee shall have the right to maintain an action in tort against any third-party responsible for such injury or death. After reasonable notice and opportunity to be represented in such action has been given to the compensation beneficiary, the liability of the third-party to the compensation beneficiary shall be determined in such action as well as the third-party's liability to the employer and carrier. . . ."

The primary obligation of the employer to provide compensation for his employees is found in § 81-1305, Ark. Stats. 1947 (1951 Supp.), as follows:

"*Liability for Compensation.*—Every employer shall secure compensation to his employees and pay or provide compensation for their disability or death from any injury arising out of and in the course of employment, without regard to fault as a cause of such injury: . . . . The pri-

mary obligation to pay compensation is upon the employer and the procurement of a policy of insurance by an employer to cover the obligation in respect to this act shall not relieve him of such obligation."

It is the contention of the appellant that he, Lanza, being in this case the prime contractor, is not a "third-party" within the meaning of § 81-1340 supra, and in support of this contention he cites § 81-1306, Ark. Stats. 1947 (1951 Supp.), which provides:

"*Subcontractors.*—Where a subcontractor fails to secure compensation required by this act, the prime contractor shall be liable for compensation to the employees of the subcontractor.

"Any contractor or his insurance carrier who shall become liable for the payment of compensation on account of injury to or death of an employee of his subcontractor may recover from the subcontractor the amount of such compensation paid or for which liability is incurred. The claim for such recovery shall constitute a lien against any moneys due or to become due to the subcontractor from such prime contractor. A claim for recovery, however, shall not affect the right of the injured employee or the dependents of the deceased employee to recover compensation due from the prime contractor or his insurance carrier."

Clearly Lanza is not liable in this proceeding if § 81-1304 of the Arkansas statute, supra, is applicable. But the court found that that statute is not applicable to the situation because Lanza is liable as a "third-party" under § 81-1340, supra.

Before discussing the applicable law involved in appellant's points 1 and 2, supra, we observe that we have reviewed the record and have concluded that the court's findings that the negligence of Lanza's employees was the cause of the accident resulting in the injuries complained of and that the injured men, Carroll, Jennings and Sisney,

were not guilty of contributory negligence as a matter of law are supported by substantial evidence, and, therefore, we cannot hold that such findings are "clearly erroneous" within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A. It was Lanza's employees who were engaged in removing the railroad rails and placing the railroad ties under the racks when the accident occurred. They had been working on the 10-rack row and the injured painters were at work on the 8-rack row when, without warning the painters, Lanza's employees started work on the 8-rack row. Their negligence in placing too great a strain on the guy wire caused the accident.

To support his contention that the remedies provided by the Arkansas Workmen's Compensation Act are exclusive, and that he is entitled to judgment as a matter of law, appellant relies upon § 81-1306 of the Arkansas statutes, supra, which provides that when a subcontractor fails to secure compensation required by the act the prime contractor shall be liable to such employees; and that in such a case the prime contractor may recover from his subcontractor the amount of such compensation so paid or for which liability is incurred. In this instance Hogan was the actual employer of the injured employees, and Lanza was not the statutory employer because it is without dispute in the record that Hogan had compensation insurance covering the appellees at the time they were injured.

The questions presented here were directly involved in the case of *Anderson et al.* v. *Sanderson & Porter et al*, 8 Cir., 146 F.2d 58; and we there considered the amendment to the Constitution of Arkansas authorizing the legislature to enact Workmen's Compensation laws and the laws enacted pursuant thereto and, in the absence of any decision of the Supreme Court of Arkansas, this court held that in

such a case as this an injured employee of a subcontractor could recover against a prime contractor for personal injuries resulting from the negligence of the prime contractor. And attention was directed to the provision of the Amendment to the Constitution wherein it is provided:

"The General Assembly shall have power to enact laws prescribing the amount of compensation to be paid by employers for injuries to or death of employees, and to whom said payment shall be made. It shall have power to provide the means, methods, and forum for adjudicating claims arising under said laws, and for securing payment of same. Provided, that otherwise no law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property; and in case of death from such injuries the right of action shall survive, and the General Assembly shall prescribe for whose benefit such action shall be prosecuted."

The opinion of this court in the *Anderson* case, supra, was rendered January 4, 1945, and no decision of the Supreme Court of Arkansas has since held to the contrary.

Appellant, while admitting the applicability of the Anderson decision, argues that it has been overruled by this court in the case of *Huffstettler* v. *Lion Oil Co.*, 8 Cir., 208 F.2d 549; and "if it has not, it ought to be overruled in the light of the Arkansas decisions subsequent to it", referring to *Hobbs-Western Company* v. *Craig*, 209 Ark. 630, 192 S.W.2d 116; *Hobbs-Western Company* v. *Morris*, 212 Ark. 105, 204 S.W.2d 889; and *Brothers* v. *Dierks Lumber & Coal* Co., 217 Ark. 632, 232 S.W.2d 646.

In making this argument it is evident that appellant has overlooked certain rules applicable to appellate reviews. The rules referred to were stated briefly by this court in *Clarke Hybrid Corn Company, Inc.*, v. *Stratton Grain Co.*,

decided June 29, 1954 (not yet published in the Federal Reporter), as follows:

"One of them [the rules] is that the prevailing party is entitled to have the evidence viewed in the aspect most favorable to it, and to have the benefit of all reasonable inferences deducible therefrom. *Cleo Syrup Corporation* v. *Coca-Cola Co.*, 8 Cir., 139 F.2d 416, 418.

"A second rule is that this Court will not retry issues of fact or substitute its judgment for that of the trial court respecting such issues. *Cleo Syrup Corporation* v. *Coca-Cola Co.*, supra, 139 F.2d 416, 417-418; *Pendergrass* v. *New York Life Insurance Co.*, 8 Cir., 181 F.2d 136; *Noland* v. *Buffalo Insurance Co.*, 8 Cir., 181 F.2d 735, 738.

"A third rule is that the burden of demonstrating error is upon the appellant, and that in cases controlled by local law this Court will accept the considered views of the trial judge as to the applicable law unless convinced that his views are erroneous. *Western Casualty & Surety Co.* v. *Coleman*, 8 Cir., 186 F.2d 40, 43; *Kimble* v. *Willey*, 8 Cir., 204 F.2d 238, 243."

See, also, *Russell* v. *Turner*, 8 Cir., 148 F.2d 562, 564; *Buder* v. *Becker*, 8 Cir., 185 F.2d 311; *Hartford Accident & Indemnity Co.* v. *Federal Deposit Ins. Corp.*, 8 Cir., 204 F.2d 933, 936.

It will be observed also that Honorable John E. Miller, judge in the Western District of Arkansas, before whom this case was tried, is the same judge before whom the *Huffstettler* case was tried; and his opinions in both cases disclose that he carefully reviewed the Arkansas statutes and decisions. See his findings and opinion in the *Huffstettler* case in 110 F. Supp. 222, and in this case in 116 F. Supp. 491.

The statutes of Arkansas and the cases cited above sustain the contention of the appellees also that the remedies

provided by the Arkansas Workmen's Compensation act are exclusive only where the employer-employee relationship exists.

Appellant's second contention is that the remedies provided by the Missouri Workmen's Compensation Act are exclusive, and that appellant is entitled to a judgment as a matter of law in No. 15,016, the *Carroll* case.

Both Hogan and Carroll are citizens of Missouri, and the contract of employment between them was entered into in Missouri. Section 3300 of the Revised Statutes of Missouri, 1929, provides:

"Every employer and every employee, except as in this chapter otherwise provided, shall be conclusively presumed to have elected to accept the provisions of this chapter and respectively to furnish and accept the compensation as herein provided, unless prior to the accident he shall have filed with the commission a written notice that he elects to reject this chapter."

And the Supreme Court of Missouri, construing this statute has held that an employee of a subcontractor cannot sue the general contractor as a third-party and at the same time collect compensation from his immediate employer when the injury is within the Missouri Workmen's Compensation Act. See *Bunner* v. *Patti, et al.*, 343 Mo. 274, 121 S.W.2d 153; *New Amsterdam Casualty Co.* v. *Boaz-Kiel Construction Co.*, 8 Cir., 115 F.2d 950.

The evidentiary facts with perhaps one exception are not in dispute. The accident in which Carroll was injured occurred in Arkansas January 26, 1953. On March 2, 1953, he filed his complaint in this case. He was paid workmen's compensation under the Missouri law at the rate of $30 each week for 34 weeks until October 10, 1953. Prior to that date counsel for appellant proposed a stipulation be ex-

ecuted showing that payments had been made under Missouri law. The stipulation was not executed by Carroll and his attorney. In October, 1953, Carroll was advised by his attorney, Mr. Fisher, that he had a right to elect to take compensation under the Arkansas law at the rate of $25 a week instead of $30 a week under the Missouri law. Upon Mr. Fisher's suggestion he elected to do so. Thereafter he received compensation payments under the Arkansas law.

Hogan and the Indemnity Company were permitted to intervene and to join with Carroll as plaintiffs and to be awarded a lien upon two-thirds of the net proceeds recovered in the action. And the judgment from which this appeal was taken awarded to Carroll the sum of $18,000 with costs and established a lien thereon in favor of Hogan and the Indemnity Company on two-thirds of the net proceeds of said judgment for the payment to them of the amounts paid and to be paid as compensation to Carroll.

In the *Carroll* case, No. 15,016, the question for determination is whether the court erred in holding that Carroll had a right to maintain this common law action under the Arkansas act or whether the action is barred by Missouri law. As observed supra, under the Missouri law the action is barred. Carroll did not file a notice wth the Commission in Missouri electing to reject the Missouri law. Section 3300, Mo. Stat. Ann., 1929; *Hope* v. *Barnes Hospital*, 227 Mo. Ap. 1055, 55 S.W.2d 319. And the Missouri act applies to injuries received outside the state under a contract of employment made in the state. Section 3310, Mo. Stat. Ann.; *Hungate* v. *Hudson*, Mo., 169 S.W.2d 682.

Of course, as the court held, the state in which the accident occurred may ordinarily apply its own Workmen's Compensation laws to accidents occurring within the state.

Pacific Employers Insurance Co. v. *Industrial Accident Commission*, 306 U.S. 493; *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U.S. 469, 476. And Arkansas applies the law of the place where the accident occurs in determining whether a person has a common law right of action.

Citing the foregoing auhtorities and others, the court said: "The Court feels that the public policy of Arkansas favoring common law actions for damages to persons and property, and favoring the application of the law of the place of the injury, precludes the application of the bar of the Missouri Act in this case."

But the fact remains that Carroll, as a matter of Missouri law, "elected" to come within the coverage of the Missouri law and to recover his compensation under that law. The question, therefore, is whether, having accepted the payments of $30 a week under the Missouri law, he could "change his mind" and elect to come under the Arkansas law, accept $25 a week thereafter, and maintain this third-party action under the Arkansas law. The court concluded that he could do so because "At the time he was receiving payments under the Missouri Act he did not know that he had the right to recover payments under the Arkansas Act, nor did he know that the payments were, in fact, being made under the Missouri Act."

In making this last finding, the court apparently overlooked Carroll's testimony in his deposition taken at the request of appellant on August 27, 1953, in which he testified that he was receiving workmen's compensation under the Missouri Workmen's Compensation Act.

It was recognized by the court and by the parties that the full faith and credit clause of the Constitution must be considered in this case. In the opinion of the court it is

said: "If the decision of the Supreme Court in the case of *Bradford Electric Light Company, Inc.*, v. *Clapper, Admx.*, 286 U.S. 145, were the last pronouncement of the Court on the question, there is little doubt but that the Full Faith and Credit clause would require the application of the Missouri bar, because the facts in the case were substantially the same as the facts in this case. However, over a period of years the holding and rationale of the *Clapper* case have been so modified by later decisions of the Supreme Court that the extent and force of the opinion is, to say the least, doubtful."

In support of this conclusion the court cites *Pacific Employers Insurance Co.* v. *Industrial Accident Commission*, 306 U.S. 493; *Alaska Packers Ass'n* v. *Industrial Accident Commission of California*, 294 U.S. 532; *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469, 476; and *Industrial Commission of Wisconsin* v. *McCartin*, 330 U.S. 622.

The court, however, does not cite *Magnolia Petroleum Co.* v. *Hunt*, 320 U.S. 430, in which case the facts more nearly coincide with the facts of the present case than do the facts in the cited cases. In the *Magnolia* case Hunt, a resident of Louisiana, was employed in that state by Magnolia as a laborer in connection with the drilling of oil wells. In the course of his employment he went to Texas where, while working on an oil well, he was injured. He procured workmen's compensation for his injuries under the Texas Workmen's Compensation law. Under the Texas law the award of compensation was final and exclusive, resembling the Missouri law in that respect. Afterward Hunt instituted a proceeding in Louisiana to recover compensation under the laws of that state. He was awarded the relief demanded by the state court of Louisiana, and the Supreme Court reversed. It is difficult to distinguish that case from the

present one. We are disposed, therefore, to apply what appears to us to be its authority here. See, also, *Ohlhaver* v. *Narron*, 4 Cir., 195 F.2d 676; and *New Amsterdam Casualty Co.* v. *Boaz-Kiel Construction Co.*, 8 Cir., 115 F.2d 950.

The result is that the judgment in No. 15,016 is reversed, and the judgments in Nos. 15,017 and 15,018 are affirmed.

(Judgment in Cause No. 15016)

United States Court of Appeals
for the
Eighth Circuit

No. 15016 - - - September Term, 1953
Friday, July 30, 1954.

M. Lanza, doing business as Lake Charles Electric Company, Appellant,

vs.

Virgil G. Carroll and Harry B. Hogan, doing business as Harry B. Hogan Painting Company, and Saint Paul-Mercury Indemnity Company.

Appeal from the United States District Court for the Western District of Arkansas.

This cause came on to be heard on the record from the United States District Court for the Western District of Arkansas and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that M. Lanza, doing business as Lake Charles Electric Company have and recover against Virgil G. Carroll and Harry B. Hogan, doing business as Harry B. Hogan Painting Company, and Saint Paul-Mercury Indemnity Company the sum of One Hundred

Seventy-five and No/100 ($175) Dollars for his costs in this behalf expended and have execution therefor.

An it is further ordered by this Court that this cause be and the same is hereby remanded to the said District Court for proceedings consistent with the opinion of this Court this day filed herein.

July 30, 1954.

(Judgment in Cause No. 15017)

United States Court of Appeals
for the
Eighth Circuit

No. 15017 - - - September Term, 1953.
Friday, July 30, 1954.

M. Lanza, doing business as Lake Charles Electric Company, Appellant,

vs.

Paul A. Jennings, a Minor, by O. E. Jennings, his Next Friend, and Harry B. Hogan, doing business as Harry B. Hogan Painting Company, and Saint Paul-Mercury Indemnity Company.

Appeal from the United States District Court for the Western District of Arkansas.

This cause came on to be heard on the record from the United States District Court for the Western District of Arkansas and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

July 30. 1954.

(Judgment in Cause No. 15018)

United States Court of Appeals
for the
Eighth Circuit

No. 15018 - - - September Term, 1953.
Friday, July 30, 1954.

M. Lanza, doing business as Lake Charles Electric Company, Appellant,

vs.

Saint Paul-Mercury Indemnity Company, Harry B. Hogan, doing business as Harry B. Hogan Painting Company, and Lonnie Sisney.

Appeal from the United States District Court for the Western District of Arkansas.

This cause came on to be heard on the record from the United States District Court for the Western District of Arkansas and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

July 30, 1954.

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 15,016-Civil

M. LANZA, ETC., *Appellant*

v.

VIRGIL G. CARROLL, Et Al, *Appellees*

APPELLEES' PETITION FOR REHEARING

Now come Virgil G. Carroll, Harry B. Hogan, doing business as Harry B. Hogan Painting Company, and St. Paul-Mercury Indemnity Company, appellees herein, and respectfully petition the Court to grant them a rehearing in this cause and, upon rehearing, to affirm the judgment herein, and, for cause, say:

The Court erred in holding that appellee, Carroll, "as a matter of Missouri law, 'elected' to come within the coverage of the Missouri law and to recover his compensation under that law" and that he could not thereafter "'change his mind' and elect to come under the Arkansas law" (Op., p. 14).

Shields M. Goodwin
Boyle Building
Little Rock, Arkansas

Attorney for Appellees

CERTIFICATE

I, Shields M. Goodwin, attorney for the appellees in this cause, do hereby certify that I have prepared and read the above and foregoing petition for rehearing and also the brief in support thereof, that they are filed in good faith and that they are believed to meritorious.

This 16th day of August, 1954.

/s/ Shields M. Goodwin

(Order denying Petition of Appellees for Rehearing in No. 15016.)

United States Court of Appeals
for the
Eighth Circuit

No. 15016 - - - September Term, 1953.
Tuesday, August 24, 1954.

M. Lanza, etc.,	)	Appeal from the
Appellant,	)	United States
vs.	)	District Court
	)	for the Wes-
Virgil G. Carroll, et al.	)	tern District
	)	of Arkansas.

Petition for rehearing filed by appellees in the above case has been considered by the Court and It is now here Ordered that same be and is hereby denied.

August 24, 1954.

(Order Staying Issuance of Mandate in Cause No. 15016)

United States Court of Appeals
for the
Eighth Circuit

No. 15016 - - - September Term, 1953.
Thursday, September 2, 1954.

M. Lanza, doing business as Lake Charles Electric Company,	)	Appeal from the United States District Court for the Western District of Arkansas.
Appellant,	)	
vs.	)	
Virgil G. Carroll, et al.	)	

On Consideration of the motion of the appellees for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

September 2, 1954.

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SUPREME COURT OF THE UNITED STATES

October Term, 1954

VIRGIL G. CARROLL, HARRY B. HOGAN, DOING BUSINESS AS HARRY B. HOGAN PAINTING COMPANY, AND ST. PAUL-MERCURY INDEMNITY COMPANY ..... *Petitioners*

v. No. 375

M. LANZA, DOING BUSINESS AS LAKE CHARLES ELECTRIC COMPANY ..... *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONERS

SHIELDS M. GOODWIN
Boyle Building
Little Rock, Arkansas

Attorney for Petitioners

February 14, 1955

PARAGON PRINTING CO., LITTLE ROCK

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SUPREME COURT OF THE UNITED STATES

October Term, 1954

VIRGIL G. CARROLL, HARRY B. HOGAN, DOING BUSINESS AS HARRY B. HOGAN PAINTING COMPANY, AND ST. PAUL-MERCURY INDEMNITY COMPANY ..... *Petitioners*

v. No. 375

M. LANZA, DOING BUSINESS AS LAKE CHARLES ELECTRIC COMPANY ..... *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS OF COURTS BELOW

The opinion of the United States District Court for the Western District of Arkansas in the consolidated *Carroll* (the case under review), *Jennings* and *Sisney* cases (See R. 40 for full style of these cases), filed November 13, 1953, is reported in 116 F. Supp. 491 and appears on pages 40-69 of the printed record in this Court.

The opinion of the United States Court of Appeals for the Eighth Circuit in the consolidated cases of *Lanza* v. *Carroll, et al*, *Lanza* v. *Jennings, et al* and *Lanza* v. *St. Paul-Mercury Indemnity Company, et al* (Nos. 15,016, 15,017 and 15,018, respectively, in that Court), filed July

30, 1954, is reported in 216 F. 2d 808 and appears on pages 135-147 of the printed record in this Court.

The opinion and judgment of the Court of Appeals in the *Carroll* case were adverse to the contention of petitioners. On August 24, 1954, rehearing was denied by that Court. *Lanza* v. *Carroll, et al*, 216 F. 2d 808 (R.151). On November 8, 1954, this Court granted the writ of certorari. *Carroll, et al* v. *Lanza*, 348 U. S. 870, 75 S. Ct. 113, 99 L. Ed. (Adv.) 49 (R.152).

The opinion and judgments of the Court of Appeals in the *Jennings* and *Sisney* cases were in conformity with the contentions of the plaintiffs and intervenors. On December 15, 1954, rehearing in those cases was denied by that Court. *Lanza* v. *Jennings, et al* and *Lanza* v. *St. Paul-Mercury Indemnity Company, et al*, 216 F. 2d 808. The judgments in those cases have since been paid.

Only the *Carroll* case is before this Court. The relevance of the *Jennings* and *Sisney* cases to that case appears in the statement of the case (*infra*, p. 3).

JURISDICTION

Jurisdiction of this Court on writ of certiorari was invoked by petitioners pursuant to USCA, Title 28, Section 1254, as amplified by that part of Rule 19(b) of this Court which provides that this Court will, in considering the question whether it should grant a review on writ of certiorari, consider cases in which

> "a court of appeals has rendered a decision in conflict with a decision of another court of appeals on the same matter;
>
> "or has decided an important state or territorial question in a way in conflict with applicable state or territorial law."

The date of the judgment sought to be reviewed, which was also the time of its entry, was July 30, 1954 (R.148).

The date of the order denying the petition for rehearing was August 24, 1954 (R.151).

The date of the order staying the issuance of the mandate was September 2, 1954 (R.151).

The date of the order of this Court granting the writ of certiorari was November 8, 1954.

QUESTION PRESENTED FOR REVIEW

Petitioner, Carroll, accepted workmen's compensation benefits under the Missouri Workmen's Compensation Act at a time when he was unaware of his right to claim compensation benefits under the Arkansas Workmen's Compensation Act. On the day he learned of his right to claim compensation benefits under the Arkansas act, he renounced his right to claim compensation benefits under the Missouri act, and claimed, and has since been receiving, compensation benefits under the Arkansas act.

The question presented for review is whether Carroll "'elected' to claim compensation benefits under the Missouri act."

A more complete statement of the question presented for review appears at the end of the statement of the case (*infra*, p. 11).

STATEMENT OF THE CASE

On January 26, 1953, petitioner, Virgil G. Carroll, an employee of petitioner, Harry B. Hogan, doing business as Harry B. Hogan Painting Company, was seriously injured as the result of what has since been judicially de-

termined to be the negligence of the respondent, M. Lanza, doing business as Lake Charles Electric Company (R.68, 70; 141-142). Paul A. Jennings and Lonnie Sisney, who were also employees of petitioner, Hogan, were injured at the same time (R. 5, 8; 12-13). The accidents occurred in Baxter County, Arkansas, where respondent, Lanza, was constructing the Bull Shoals Dam and petitioner, Hogan, was engaged in the performance of a subcontract under Lanza (R. 5, 8; 12-13).

The injuries to Carroll, Sisney and Jennings arose out of, and in the course of, their employment by Hogan, who, pursuant to the requirement of the Arkansas Workmen's Compensation Act (Sec. 81-1306, 1951 Cum. P. Supp., Ark. Stats. 1947), carried with St. Paul-Mercury Indemnity Company, the other petitioner, a standard workmen's compensation and workmen's liability policy of insurance on his employees in Missouri and Arkansas (R.93).

On March 2, 1953, Carroll and Jennings filed separate suits for damages against the respondent, Lanza, in the Circuit Court of Baxter County, Arkansas (R. 5-7; 8-10). These suits were duly removed by non-resident defendant to the United States District Court for the Harrison Division of the Western District of Arkansas (R.1-5). Hogan and the St. Paul, who had made payments to Carroll and Jennings on account of their compensation coverage on them, intervened as plaintiffs in these suits for the purpose of asserting their subrogation claims against the recovery, if any, in the third-party suits for damages against Lanza (R.20-26). On June 13, 1953, the St. Paul, Hogan and Sisney filed a suit for damages against Lanza in the United States District Court for the Harrison Division of the Western District of Arkansas, in which suit, as in the *Carroll* and *Jennings* cases, St. Paul and Hogan

asserted subrogation claims against the recovery, if any, against Lanza (R.12-14).

Respondent's answer in each of the three cases denied liability (R.15-20). By agreement, the suits were consolidated for trial by the District Court without a jury (R.27), in which Court they were tried on November 5 and 6, 1953. When, on November 13, 1953, that Court rendered an exhaustive opinion and made appropriate findings of fact and conclusions of law (R.40-69), it entered judgments for the plaintiffs and intervenors against Lanza, as follows: In the *Carroll* case, $18,000.00 (R.70-71); in the *Jennings* case, $6,000.00 (R.71-72); and, in the *Sisney* case, $22,500.00 (R.72-73). Lanza appealed from each of the judgments, but did not question their amounts (R.73-76, 83-86).

On July 30, 1954, the United States Court of Appeals for the Eighth Circuit affirmed the judgments in the *Jennings* and *Sisney* cases (Nos. 15,017 and 15,018 in that Court), concluding that the District Court's "findings that the negligence of Lanza's employees was the cause of the accident resulting in the injuries complained of and that the injured men, Carroll, Jennings and Sisney, were not guilty of contributory negligence as a matter of law" were "supported by substantial evidence", etc., 216 F. 2d 813 (R. 141); but it reversed the judgment in the Carroll case (No. 15,016 in that Court) on the ground that he had " 'elected' to come within the coverage of Missouri (workmen's compensation) law and to recover his compensation under that law." 216 F. 2d 815 (R.146).

At this juncture, petitioners set out the reasons which impelled the Court of Appeals—erroneously, as petitioners maintain—to invoke the doctrine of election of remedies and reverse the judgment in the case under review (the *Carroll* case) while properly affirming the judgments in

the *Jennings* and *Sisney* cases. Petitioners submit that the reasons assigned by the Court of Appeals are wholly insufficient to bring about a result in the *Carroll* case different from that in the *Jennings* and *Sisney* cases.

In the first place, the Court of Appeals rested its opinion upon the failure of Carroll to file the written notice permitted under Section 3300, Mo. Stat. Ann., 1929, which provides as follows (216 F. 2d 815 (R.145)):

> "Every employer and every employee, except as in this chapter otherwise provided, shall be conclusively presumed to have elected to accept the provisions of this chapter and respectively to furnish and accept the compensation as herein provided, unless prior to the accident he shall have filed with the commission a written notice that he elects to reject this chapter."

The Court of Appeals took the view that, by failing to file the written notice permitted under that statute, Carroll thereby "elected" to have his right to maintain this suit determined by the Missouri act. 216 F. 2d 815-816 (R.145-146). Petitioners maintain that, by failing to file the written notice permitted by Section 3300, Carroll merely elected to be considered as being a "compensation" employee, not a "common law" employee, and that he was free to elect to claim compensation benefits under the law of *any* State under which those benefits could properly be paid to him.

In the second place, the Court of Appeals based its decision upon the fact that Carroll accepted payments of $30 a week under the Missouri act for approximately nine months. The Court, reasoning that he thereby elected "to recover his compensation under" the Missouri law, held that he could not thereafter " 'change his mind' and elect to come under the Arkansas law, accept $25 a week there-

after, and maintain this third-party action under the Arkansas law". 216 F. 2d 815 (R.146). In other words, the Court invoked the doctrine of election of remedies against Carroll and held that, although his injury occurred in Arkansas, the Missouri act applied to the exclusion of the Arkansas act.

Petitioners contend that Carroll never elected to come under the Missouri law. This makes it necessary, therefore, to state the facts material to the question whether there was an election. All of these facts are uncontradicted.

Jennings and Sisney were residents of Arkansas, where their contracts of employment were made (R.105, 108). They always claimed, and were paid, workmen's compensation benefits under the Arkansas Workmen's Compensation Act (R.23, 14). All the parties in the *Jennings* and *Sisney* cases agreed that the question whether the plaintiffs and intervenors therein could maintain those suits should be determined under the Arkansas act. The United States Court of Appeals for the Eighth Circuit had held, in 1945, that such suits could be maintained: that is to say, that a general contractor (as, for example, Lanza) is, as to employees of subcontractors carrying workmen's compensation insurance (as, for example, Hogan), a "third-party" who, under Arkansas compensation law, may be sued for common law negligence. *Anderson* v. *Sanderson & Porter*, 146 F. 2d 58, 60. That Court re-affirmed that doctrine in the *Jennings* and *Sisney* cases, 216 F. 2d 808, 816 (R.135, 147).

But the Supreme Court of Arkansas had never passed upon that question on July 30, 1954, when those cases were decided. Accordingly, the Court of Appeals deferred action upon Lanza's petition for rehearing in the *Jennings*

and *Sisney* cases until *The Baldwin Company* v. *Ernest Maner, Judge* (Ark.), 273 S.W. 2d 28, was decided. The question there was precisely the same as the question in the *Anderson* case. The opinion in *The Baldwin Company* case was rendered December 6, 1954. The Supreme Court of Arkansas there followed the doctrine of the *Anderson* case. Accordingly, on December 15, 1954, the Court of Appeals denied Lanza's petition for rehearing in the *Jennings* and *Sisney* cases. 216 F. 2d 808.

Carroll was a resident of Missouri, and his contract of employment with Hogan was made in that State (R. 92, 94). Carroll never procured an award from the Missouri Workmen's Compensation Commission and never even filed his claim with that commission (R.98, 94, 35-37); but the St. Paul, for a period of 34 weeks (January 26, 1953-October 10, 1953), voluntarily paid workmen's compensation benefits to him under the Missouri act (R.35-37), and he knew these benefits were being paid to him under that act (R.30).

On October 10, 1953, *Carroll learned for the first time that he could have claimed workmen's compensation benefits under the Arkansas Workmen's Compensation Act* (R.35,37). On that day he wrote letters to the Kansas City, Missouri, and Little Rock, Arkansas, offices of the St. Paul, requesting that his "compensation benefits be computed under the Workmen's Compensation Act of Arkansas instead of the Workmen's Compensation Act of Missouri" and that his "claim be considered a claim under the Arkansas act" (R.35,32-33). Carroll said in an affidavit (R.35):

> "If I had known all along that I had the right to receive compensation benefits under the Workmen's Compensation Act of Arkansas, I would, immediately after I was injured, have requested

that these benefits be paid to me under the law of Arkansas instead of under the law of Missouri."

The affidavit of Harold J. Fisher, Carroll's Springfield, Missouri, lawyer, dated October 20, 1953, was likewise to the effect that it was not until October 10, 1953, that he advised Carroll of his right to obtain compensation benefits under the Arkansas act if he so desired. Mr. Fisher also made it plain that Carroll's compensation claim was never filed with the Missouri commission (R.36-37). These affidavits, which were filed by petitioners in opposition to respondent's motion for summary judgment under Rule 56 (R.29-30), were never drawn in question by respondent.

By letter dated October 21, 1953, the Little Rock office of the Saint Paul, in filing the claim with the Arkansas Workmen's Compensation Commission, said, among other things: "We have no objection to Mr. Carroll's election to receive his benefits under the Arkansas act" (R.31). The Arkansas Workmen's Compensation Commission promptly accepted the claim and assigned to it a number, as shown by the certificate of the chairman of that commission, dated October 22, 1953 (R.38); and Carroll has been receiving his compensation benefits under the Arkansas act since that time.

On these facts, the District Court denied Lanza's motion for summary judgment (R.59). That Court reasoned that, since the accident occurred in Arkansas, Carroll could, from the beginning, have claimed compensation benefits under the law of Arkansas, in which event, under the doctrine of the *Anderson* case, he could have successfully maintained this suit, and that he was not thereafter estopped or precluded from renouncing his rights under the Missouri act and claiming benefits under the Arkansas act for the reason that, during all the time that he was

receiving benefits under the Missouri act, *he was unaware of his rights under the Arkansas act* (R.54-59).

The Court of Appeals, overlooking the uncontradicted testimony that Carroll was *not aware* of his rights under the Arkansas act while he was receiving compensation benefits under the Missouri act, held that Carroll's acceptance of benefits under the Missouri act constituted an election "to come within the coverage of the Missouri law and to recover his compensation under that law" and that he could not thereafter " 'change his mind' and elect to come under the Arkansas law, accept $25 a week thereafter and maintain this third-party action under the Arkansas law". 216 F. 2d 815 (R.146).

As was pointed out by the Court of Appeals in the *Anderson* case, the provisions of the Missouri Workmen's Compensation Act differ in controlling respects from the corresponding provisions in the Arkansas Workmen's Compensation Act upon the question whether an employee of a subcontractor who carries workmen's compensation insurance on his employees may maintain a common law action for damages against the prime contractor. 146 F. 2d 60. In *Banner* v. *Patti*, 343 Mo. 274, 121 S. W. 2d 153, and *New Amsterdam Casualty Company* v. *Boaz-Kiel Construction Company*, 8 Cir., 115 F. 2d 950, which were cited in the *Anderson* case, the Supreme Court of Missouri and the United States Court of Appeals for the Eighth Circuit, respectively, had held that, under the Missouri act, such a suit could not be maintained. Accordingly, since the Court of Appeals had held—erroneously, as petitioners contend in this (the *Carroll*) case—that Carroll had elected "to come within the coverage of the Missouri law and to recover his compensation under that law", in consequence of which the rights of the parties should be determined under the Missouri act instead of the Arkansas

act, it reversed the judgment against Lanza in the *Carroll* case.

The question presented for review (*supra*, p. 3), therefore, is upon the validity of the opinion of the Court of Appeals that, by not filing a written notice rejecting the provisions of the Missouri Workmen's Compensation Act and by accepting workmen's compensation benefits under that act at a time when he did *not* know that he could have claimed and received compensation benefits under the Arkansas Workmen's Compensation Act, Carroll "'elected' to come within the coverage of the Missouri law" (216 F. 2d 815 (R. 146)) and was thereby precluded from renouncing his rights under the Missouri act and from claiming benefits under the Arkansas act on the day he first learned of his rights under the Arkansas act.

ARGUMENT

The sole question is whether Carroll "elected" to claim compensation benefits under the Missouri Workmen's Compensation Act. Petitioners contend not only that he never made an election until October 10, 1953, but that he necessarily could not have made an election before that time for the reason that, prior to that day, he believed that he had the right to claim benefits *only* under the Missouri act (R.35, 37). It has been pointed out that, on October 10, 1953, Carroll elected to claim benefits under the Arkansas act (*supra*, p. 8); R.35, 32-33).

Petitioners maintain that Carroll was within his rights in claiming and receiving benefits under the Arkansas act; that the question whether he is entitled to maintain this common law action for damages against the prime contractor must, therefore, be determined under the Arkansas act; and that since, under the Arkansas act, such a suit may be maintained, the Court of Appeals erred in reversing the judgment of the District Court in favor of petitioners.

We now consider the two reasons advanced by the Court of Appeals in support of its conclusion that Carroll " 'elected' to come within the coverage of the Missouri law and to recover his compensation under that law". 216 F. 2d 815 (R.146).

(a) *Carroll's Failure to File a Written Notice Rejecting the Missouri Act Did Not Constitute an "Election"*

The Missouri statute upon which respondent relies (Section 3300, Mo. Stat. Ann., 1929; *supra*, p. 6) relates, and relates only, to the question whether an employee de-

sires to be a "compensation" employee or a "common law" employee. The statute has no bearing, directly or indirectly, upon the question whether a "compensation" employee in a given case desires to receive his workmen's compensation benefits under the law of Missouri or under the law of any other State (for example, Arkansas) under whose workmen's compensation act he might be entitled to receive benefits.

In other words, the failure of Carroll to file with the Missouri commission the written notice referred to in the statute means at most that he is a *compensation* employee, not a common law employee; it does *not* mean that he thereby "elected" to receive compensation payments *under the Missouri Act*. Whether or not he has made such an election depends upon the application of the doctrine of election of remedies to the facts in this case, wholly influenced by, and separate and apart from, the circumstance that, by his failure to file the written notice, he became a compensation employee under the law of *some* State.

The Court of Appeals, noting that "Carroll did not file a notice with the commission in Missouri electing to reject the Missouri law", said that "the Missouri act applies to injuries received outside the State under a contract of employment made in the State. Section 3300, Mo. St. Ann.; *Hungate* v. *Hudson*, Mo., 169 S.W. 2d 682" (R.145). If, by this observation, the Court of Appeals intended to hold that, by Carroll's failure to file the written notice permitted under Section 3300, he elected to come under the Missouri act, thereby making it impossible for him to claim compensation benefits under the Arkansas act, the ruling was in conflict with decisions of this Court which hold that a State may provide workmen's compensation benefits for all employees injured within it, even

though they are residents of another State and even though their contract of employment was made in another State.

Pacific Employers Insurance Company v. *Industrial Accident Commission of California*, 306 U. S. 493, 83 L. Ed. 940, 59 S. Ct. 629, is a leading case on the point. There, a Massachusetts employee of a Massachusetts employer was injured in California in the course of his employment. He obtained a compensation award from the Industrial Accident Commission of California. The employer's insurance carrier thereupon filed a petition to set aside the award upon the grounds that the employee "was subject to the workmen's compensation law of Massachusetts, and that the California Commission, in applying the California act, and in refusing to recognize the Massachusetts statute as a defense, had denied to the latter the full faith and credit to which it was entitled under Article 4, Section 1 of the Constitution" (p. 497) of the United States. More specifically, the insurance carrier relied upon "the provisions of the Massachusetts Act that the compensation shall be that prescribed for injuries suffered in the course of employment, whether within or without the State" (p. 499), and it insisted that, "since the contract of employment was entered into in Massachusetts and the employer consented to be bound by the Massachusetts Act, that, and not the California statute, fixes the employee's right to compensation, whether the injuries were received within or without the State, and that the Massachusetts statute is constitutionally entitled to full faith and credit in the courts of California" (p. 499).

The Supreme Court of California rejected the insurance carrier's contention. Affirming that decision, this Court held that the full faith and credit clause does not go so far as to deny the right of a State to apply its

own workmen's compensation statute in its courts in the case of an employee injured within the State. The Court said (p. 503):

> "Although Massachusetts has an interest in safeguarding the compensation of Massachusetts employees while temporarily abroad in the course of their employment, and may adopt that policy for itself, that could hardly be thought to support an application of the full faith and credit clause which would override the constitutional authority of another state to legislate for the bodily safety and economic protection of employees injured within it. *Few matters could be deemed more appropriately the concern of the state in which the injury occurs or more completely within its power*" (Italics supplied).

To the same effect is the recent (December 6, 1954) case of *Watson* v. *Employers Liability Assurance Corporation*, 348 U. S. 66, 75 S. Ct. 166, 99 L. Ed. 90. There, appellants bought and used in Louisiana, and were injured there by, "a hair waving product alleged to have contained a highly dangerous latent ingredient put there by its manufacturer" (p. 67). Louisiana has a statute which allows "injured persons to bring direct actions against liability insurance companies that have issued policies contracting to pay liabilities imposed on persons who inflict injury" (p. 67). Pursuant to that statute, appellants brought, in a Federal Court in Louisiana, a direct action against appellee, which had issued a liability policy on the manufacturer.

The company contended, among other things, that the Louisiana statute was violative of the full faith and credit clause. This Court, in stating the issue, said (p. 67):

> "The particular problem presented with reference to enforcing the Louisiana statute in this

> case arises because the insurance policy sued on was negotiated and issued in Massachusetts and delivered in Massachusetts and Illinois. This Massachusetts-negotiated contract contains a clause, recognized as binding and enforceable under Massachusetts and Illinois law, which prohibits direct actions against the insurance company until *after* final determination of the (manufacturer's) obligation to pay personal injury damages either by judgment or agreement."

This Court upheld the validity of the Louisiana statute, which was in the teeth of the clause in the insurance policy sued on, with reference to the full faith and credit clause, saying (p. 73):

> "That clause does not automatically compel a state to subordinate its own contract laws to the laws of another state in which a contract happens to have been formally executed. Where, as here, a a contract affects the people of several states, each may have interests that leave it free to enforce its own contract policies (Citing cases). We have already pointed to the vital interests of Lousiana in liability insurance that covers injuries to people in that State. Of course Massachusetts also has some interest in the policy sued on in this case. The insurance contract was formally executed in that State and (the manufacturer) has an office there. But plainly these interests cannot outweigh the interests of Louisiana in taking care of those injured in Louisiana. Since this is true, the Full Faith and Credit Clause does not compel Louisiana to subordinate its direct action provisions to Massachusetts contract rules", (Citing cases).

State ex rel. Weaver v. *Missouri Workmen's Compensation Commission*, 339 Mo. 150, 95 S.W. 2d 641, is a Missouri case in accord. There, a resident of Missouri, whose contract of employment was made in Illinois, died from injuries received in Missouri while acting in the

scope of his employment. His widow applied for compensation benefits under the Missouri act. The Missouri commission "declined to take jurisdiction of the application upon the grounds that (1) since the contract of employment was made in Illinois, the Missouri statute (subsection (b), *supra*) does not apply and (2) even if the Missouri statute would apply, the Missouri commission should decline jurisdiction because the Illinois law also applies, and must, under the full faith and credit clause of the Federal Constitution, be given effect in Missouri" (p. 642).

Thereupon the widow applied to the Supreme Court of Missouri for a writ of mandamus to compel the Missouri commission to take jurisdiction of her claim. That Court held that the widow had a right to proceed under the compensation law of Missouri or the compensation law of Illinois and that, consequently, neither of those laws was exclusive of the other, saying (p. 643):

> "The Missouri Law applying, the Illinois Act also applying, and each providing that its remedy is in lieu of all others, the two statutes and the relationship created by each are brought into direct conflict."

The Court then held that the full faith and credit clause of the Constitution of the United States did not prevent Missouri from considering the claim under its own compensation act.

In the Court below, respondent also relied upon Section 3310, Mo. Stat. Ann., 1929, which provides as follows:

> "This chapter shall apply to all injuries received in this state, regardless of where the contract of employment was made, and also to all injuries received outside of this state under contract of employment made in this state, unless the contract of employment in any case shall otherwise provide."

Respondent argued that, since Carroll's contract of employment was made in Missouri and since that contract contained no provision as to the State whose law would govern the construction of the contract, the statute makes the Missouri act apply to the exclusion of the right of Arkansas to provide compensation benefits for Carroll, even though he was injured in Arkansas. The cases cited above resolve this argument against respondent's contention.

The opinion of the Court of Appeals cited, and relied upon, *Magnolia Petroleum Company* v. *Hunt*, 320 U. S. 430, 88 L. Ed. 149, 64 S. Ct. 208 (216 F. 2d 816 (R.147)). But the case is not in point. There, the plaintiff, who had already "sought and procured in Texas an award of compensation for his injury under its Workmen's Compensation Law" (p. 432), thereafter undertook to obtain compensation for the same injury under the Louisiana Workmen's Compensation Law. This Court properly rejected his claim under the Louisiana law, holding that "the Texas award, being a bar to any further recovery of compensation for respondent's injury, is, by virtue of the full faith and credit clause, exclusive of his remedy under the the Louisiana Act" (p. 442).

As pointed out in the statement of the case at bar (*supra*, p. 8), Carroll never procured an award of compensation from the Missouri commission and never even filed his claim with that commission (R.98, 94, 35-37). The *Carroll* case is, therefore, clearly distinguishable from the *Magnolia Petroleum Company* case, since there is no award of the Missouri commission to which full faith and credit can be given.

Respondent also relied upon *Butler* v. *Lee Brothers Trucking Contractors*, 206 Ark. 884, 178 S.W. 2d 58, to support his contention that the full faith and credit clause

precludes Carroll from asserting his claim for compensation benefits under the Arkansas act after October 10, 1953. In that case, Butler's claims for "injuries were presented to the Colorado Compensation Commission and allowances were made as provided by the statutes of that State" (p. 885). The Supreme Court of Arkansas properly held that he could not thereafter obtain benefits on the same cause of action under the Arkansas act. That Court, basing its opinion upon the fact that *Butler had obtained a compensation award from the Colorado Commission*, cited the *Magnolia Petroleum Company* case as authority for its decision. Here, Carroll never sought or procured an award from the Missouri commission.

Respondent contended in the Court of Appeals that it was "customary in Missouri, in uncontested compensation cases, for the act to be implemented by the payment and receipt of compensation, without any requirement that there be any formal claim or formal award". If such a custom exists, it devolved upon respondent to establish it. The record is silent on the point. Even if such a custom had been shown to exist in Missouri, it would have availed respondent nothing, since the full faith and credit clause does not cover customs but is referable only to "the public acts, records and judicial proceedings" of a State. Constitution of the United States, Article 4, Section 1.

These authorities establish these rules:

Notwithstanding the Missouri statutes upon which respondent relies, Arkansas has the right to enact a workmen's compensation act which is available to all employees injured in Arkansas, even though their contracts of employment were made in Missouri; and

Notwithstanding the full faith and credit clause, Carroll was free to assert his right to compensation benefits

EITHER under the Missouri act (because his contract of employment was made in Missouri) OR under the Arkansas act (because he was injured in Arkansas).

It follows that respondent's contention, in the Court of Appeals, that the remedies provided by the Missouri act are exclusive of all other remedies is without merit.

We pass now to a consideration of the question whether, by accepting compensation payments under the Missouri law, Carroll elected to come within the coverage of that law.

(b) *Carroll's Acceptance of Compensation Benefits Under the Missouri Act at a Time When He Was Unaware of His Right to Claim Benefits under the Arkansas Act Did Not Constitute an "Election"*

In the statement of the case (*supra*, p. 8), it was pointed out that the uncontradicted proof was that the Missouri commission never made an award of compensation benefits to Carroll and that he never even filed a claim for compensation benefits with that commission (R.98, 35-37); that it was not until October 10, 1953, that Carroll knew that he could, if he so desired, obtain compensation benefits under the Arkansas act (R. 35, 37); and that, on that very day, in letters to the St. Paul, he renounced his rights under the Missouri act and claimed compensation benefits under the Arkansas act (R.31, 32-33). Under these circumstances, Carroll made no "election" until October 10, 1953, because it was not until that day that there was "a conscious exercise of choice" by him.

The rule in Arkansas is stated as follows in *City National Bank* v. *McCann*, 193 Ark. 967, 980, 106 S.W. 2d 195:

> "Therefore, the case of *Craig* v. *Meriwether*, 84 Ark. 238, 105 S.W. 585, cited by plaintiffs, is con-

trolling. '*The binding force of an election cannot be predicated upon mere imputed knowledge, for the doctrine is based entirely upon the idea of a conscious exercise of choice between two remedies which are inconsistent with each other.* In order that a person who is put to his election should be concluded by it, two things are necessary: first, a full knowledge of the nature of the inconsistent rights, and of the necessity of electing between them; second, an intention to elect, manifested either expressly or by acts which imply choice and acquiescence'" (Italics supplied).

This also is the rule in Missouri. In *Sutorius* v. *Mayor*, 350 Mo. 1235, 170 S.W. 2d 387, 396, the Supreme Court of Missouri said:

> "The rule is that acts and conduct to constitute an election must be unequivocal in character, showing an intention to elect, and be done with an understanding of the situation and with the intent to make an election. *Calvin* v. *Hutchison, supra. Acts done in ignorance of one's legal rights and without knowledge of the facts necessary to a decision do not amount to a binding election where the position of the parties has not changed*" (Citing Missouri cases) (Italics supplied).

In the case at bar, the position of the parties has not changed.

This Court has likewise consistently limited the application of the doctrine of election of remedies to cases in which the party against whom it is sought to be invoked had knowledge of his rights and of the facts at the time the election is alleged to have been made. *Robb* v. *Vos*, 155 U. S. 13, 43, 39 L. Ed. 52, 15 S. Ct. 4; and *United States* v. *Oregon Lumber Company*, 260 U. S. 290, 295, 67 L. Ed. 261, 43 S. Ct. 100.

Various United States courts of appeals have likewise emphasized the fact that there can be no election of remedies unless, at the time the election is alleged to have been made, the party had full knowledge of the nature of his inconsistent rights. The following cases are typical of many:

Third Circuit: *Pittsburgh Terminal Coal Corporation* v. *Bennett*, 73 F. 2d 387, 389; and *Flannery Bolt Company* v. *Greenslade*, 26 F. Supp., 502, 505; affirmed 108 F. 2d 531; certiorari denied 309 U. S. 671, 84 L. Ed. 1017, 60 S. Ct. 615.

Fifth Circuit: *A. Klipstein & Company* v. *Grant*, 141 F. 72.

Ninth Circuit: *Miles* v. *Lavender*, 10 F. 2d 450, 454.

Tenth Circuit: *Minneapolis National Bank* v. *Liberty National Bank*, 74 F. 2d 434, 436.

Petitioners have found no authority to the contrary.

The undisputed proof brings this case squarely within the rule that Carroll did not elect, and necessarily could not have elected, to accept compensation benefits under the Missouri act for the reason that, while he was receiving them, he did not know that he had the right to claim compensation benefits under the Arkansas act.

Apparently realizing the legal effect of this evidence (*i.e.*, that Carroll did not know of his rights under the Arkansas act until October 10, 1953), respondent, in the Court of Appeals, was driven to the contention that "it must be assumed" that Mr. Fisher and the St. Paul knew of Carroll's rights under the Arkansas act prior to that time and that knowledge should be imputed to Carroll. Respondent offered no proof that these parties had that knowledge; and it would be highly improper to assume that they had it. Even if the Court should make the assumption

requested by respondent, it would avail him nothing for the reason that "the binding force of an election cannot be predicated upon mere imputed knowledge, for the doctrine (of election of rem edies) is based entirely upon the idea of a conscious exercise of choice between two remedies which are inconsistent with each other". *City National Bank* v. *McCann*, 193 Ark. 967, 980, 106 S.W. 2d 195; *supra*, p. 20. It follows, therefore, that, even if Mr. Fisher and the St. Paul were aware of Carroll's rights under the Arkansas act prior to October 10, 1953, that knowledge would not be imputed to Carroll.

In the Courts of Appeals, respondent complained of the "gymnastics engaged in by Carroll on October 10, 1953". Petitioners inquire: "What gymnastics?" It is true that, in order to be able to maintain his common law action for damages against the prime contractor, Carroll took steps that day to claim compensation benefits under the Arkansas act, thereby electing to submit his claim under that act. The third party tortfeasor, whose negligence has been adjudicated to have caused Carroll's injuries, should not be heard to complain that Carroll looked after his own interest promptly after he first learned of his rights under the Arkansas act. Carroll testified that if he had known from the beginning that he had the right to claim compensation benefits under the Arkansas act, he would have claimed them under that act (R.35). Surely he should not be criticised for asserting his rights thereunder as soon as he ascertained that he had such rights.

It is true, as pointed out by the Court of Appeals (216 F. 2d 815 (R.146)), that the District Court erroneously stated that Carroll did not know that he received compensation payments under the Missouri act (R.58, 60). But the error is of no consequence. The controlling and undisputed fact is that Carroll was *wholly unaware* of his

rights under the Arkansas act throughout the entire period of his acceptance of compensation benefits under the Missouri act. The District Court correctly declared and applied the law when it held (R.59):

> "It was not until October 10, 1953, that Carroll exercised a conscious choice between two inconsistent remedies, and it was not until then that he made an election as to which Act he desired to govern his compensation payments. His (fol. 75) decision was to accept such payments under the Arkansas Act, and the Arkansas Workmen's Compensation Commission accepted the filing of his claim.
>
> "The accident occurred in Arkansas, and it would seem that by virtue of Sections 81-1302 and 81-1303, Arkansas Statutes 1947, Annotated (1951 Supp.), Carroll's claim may be granted under the Arkansas Act. And, since he is receiving compensation under the Arkansas Act, he is also entitled to the benefit of its third party rule permitting an employee of a subcontractor to prosecute a suit against the general contractor. Therefore, the Court has jurisdiction of the action brought by Carroll against the defendant herein, and defendant's motion for judgment should be denied."

CONCLUSION

The Court of Appeals, holding that Carroll's failure to file a written notice rejecting the Missouri Workmen's Compensation Act constituted an election to come under that act and that his acceptance of compensation benefits under the Missouri act at a time when he was unaware of his right to claim benefits under the Arkansas act constituted a like election, reversed the judgment of the District Court for petitioners upon the ground that the Missouri act, under which the action could not be maintained, applies. This was error.

The question whether petitioners may maintain this common law action for negligence must, therefore, be determined under the Arkansas Workmen's Compensation Act, in which State Carroll was injured. Under that act, as construed in the *Anderson* case (*supra*, p. 7) and *The Baldwin Company* case (*supra*, p. 8), the action may be maintained.

Accordingly, the judgment of the Court of Appeals should be reversed and the cause remanded to that Court, with directions to reinstate the judgment of the District Court.

Respectfully submitted,

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February 14, 1955

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

VIRGIL G. CARROLL, HARRY B. HOGAN, doing business as HARRY B. HOGAN PAINTING COMPANY, and ST. PAUL-MERCURY INDEMNITY COMPANY ..... *Petitioners*

v. No. 375

M. LANZA, doing business as LAKE CHARLES ELECTRIC COMPANY ..... *Respondent*

REPLY BRIEF FOR PETITIONERS

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October 26, 1954

PARAGON PRINTING CO., LITTLE ROCK

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

I. *There Is a Conflict of Decision*

Throughout the time that Carroll was receiving compensation payments under the Missouri Workmen's Compensation Act, he did not know that he had the right to claim compensation benefits under the Arkansas Workmen's Compensation Act (R.35-37). Respondent, in his brief, has not undertaken to explain away this fact which, as was pointed out on page 5 of the petition, is undisputed; in fact, although it is the point upon which the case turns, he does not even refer to it.

The Court of Appeals manifestly overlooked this decisive fact when it held that Carroll had " 'elected' to come

within the coverage of the Missouri law and to recover his compensation under that law" (Appendix to Petition, p. xiv). Despite respondent's argument to the contrary (Br. 5), it is very clear that the Court of Appeals reversed the judgment for petitioners on the ground that Carroll had formally elected his remedy under the Missouri Act and that Missouri law must therefore be applied in determining whether a common law action for negligence could be maintained. Under the Missouri Act, the action cannot be maintained. *Bunner* v. *Patti*, 343 Mo. 274, 121 S.W. 2d 153, and *New Amsterdam Casualty Co.* v. *Boaz-Kiel Construction Co.*, 8 Cir., 115 F. 2d 950 (Petition, p. 5); under the Arkansas Act, it can be maintained. *Anderson* v. *Sanderson & Porter*, 8 Cir., 146 F. 2d 58 (Petition, p. 4).

On pages 4 and 10 of his brief, respondent points out that the Supreme Court of Arkansas has never passed upon the question whether the Arkansas Act would bar the present action. That is true. *The Baldwin Company* v. *The Circuit Court of Hot Spring County, Arkansas, Honorable Ernest Maner, Judge*, No. 572, Supreme Court of Arkansas, is a petition for writ of prohibition in which this one issue is now being squarely presented to that Court. That case will probably be decided in January, 1955. If this Court has any misgivings about the correctness of the rule of the *Anderson* case, petitioners respectfully suggest that action upon this petition for writ of certiorari be deferred until after *The Baldwin Company* case is decided.

Ohlhaver v. *Narron*, 4 Cir., 195 F. 2d 676, *Jonathan Woodner Company* v. *Mather*, D.C. Cir., 210 F. 2d 868, and *Bradford Electric Company* v. *Clapper*, 286 U.S. 145, 76 L. Ed. 1026, 52 S. Ct. 571, relied upon on pages 7-10 of respondent's brief, are wholly irrelevant. None of them involves the issue presented in the case at bar, namely,

whether a party can be held to have elected one remedy when he was unaware of an inconsistent remedy.

Respondent's purpose in citing those cases may have been to urge upon this Court the theory that the Missouri Act is exclusive as to all Missouri residents (such as Carroll) whose contract of employment was made in Missouri and that Arkansas does not have the right to provide workmen's compensation for those employees even though they are injured in Arkansas. If such was his purpose, his point is not well taken, since this Court is firmly committed to the doctrine that "few matters could be deemed more appropriately the concern of the state in which the injury occurs or more completely within its power" than legislation "for the bodily safety and economic protection of employees injured within it" and that the "application of the full faith and credit clause" cannot "override the constitutional authority" of a state (as, for example, Arkansas) to enact such legislation even though another state (as, for example, Missouri) has attempted to make its compensation act exclusive as to all its employees. *Pacific Employers Insurance Company* v. *Industrial Accident Commission*, 306 U. S. 493, 503, 83 L. Ed. 940, 59 S. Ct. 629.

The courts uniformly hold that "election" involves choice, and that there can be no election unless, at the time it is alleged that an election was made, the party had full knowledge of the nature of his inconsistent rights and an opportunity to choose between them (Petition, pp. 12-15). Respondent does not take issue with this principle, but simply ignores it. When the principle is applied, the result is that the decision of the Court of Appeals is in conflict with the opinions of numerous courts, both state and federal; in fact, the decision finds no support in any jurisdiction.

II. *The Court Incorrectly Interpreted the Import of the Case of Magnolia Petroleum Company* v. *Hunt*

Respondent is hard pressed indeed to advance a plausible reason for the applicability of *Magnolia Petroleum Company* v. *Hunt*, 320 U.S. 430, 88 L.Ed. 149, 64 S. Ct. 208. As was pointed out on page 15 of the petition, Carroll never obtained an award of compensation from the Missouri Workmen's Compensation Commission and never even filed his claim with that commission.

Respondent now says that "it is customary in Missouri, in uncontested compensation cases, for the Act to be implemented by the payment and receipt of compensation, without any requirement that there be any formal claim or formal award". If such a custom exists, it devolved upon respondent to establish it. The record shows respondent did not undertake to do this. Even if such a custom had been shown to exist in Missouri, it would have availed respondent nothing, since the full faith and credit clause (Constitution of the United States, Article 4, Section 1) does not cover customs but is referable only to "the public acts, records and judicial proceedings" of a state.

CONCLUSION

When the case was tried in the District Court in November, 1953, and judgment for $18,000.00 was rendered in favor of petitioners, Carroll was receiving his compensation payments under the Arkansas Act which, as construed in the *Anderson* case, permits a common law action for damages to be maintained in such a suit as this. The opinion of the Court of Appeals, which reversed that judgment on the ground that Carroll had theretofore " 'elected' to come within the coverage of the Missouri law and to recover his compensation under that law", is in conflict with opinions of this Court, other courts of appeals and appellate courts in Arkansas, Missouri and other states, the undisputed proof being that Carroll was not aware of his rights under the Arkansas Act at any time while he was receiving compensation payments under the Missouri Act.

By reason of this conflict of decision, the petition for writ of certiorari should be granted.

Respectfully submitted

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October 26, 1954

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SUPREME COURT OF THE UNITED STATES

October Term, 1954

VIRGIL G. CARROLL, HARRY B. HOGAN, DOING BUSINESS AS HARRY B. HOGAN PAINTING COMPANY, AND ST. PAUL-MERCURY INDEMNITY COMPANY ..... *Petitioners*

v. No. 375

M. LANZA, DOING BUSINESS AS LAKE CHARLES ELECTRIC COMPANY ..... *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

STATEMENT OF THE CASE

Respondent's statement of the case (Br.2-4) is conspicuous for its omission to include the uncontradicted fact that it was not until October 10, 1953, that Carroll learned for the first time that he could have claimed workmen's compensation benefits under the Arkansas Workmen's Compensation Act (See R. 35-37; Petrs'. Orig. Br.8). This is the circumstances which led the District Court to apply the doctrine of election of remedies by holding that it was not until that day "that Carroll exercised a conscious choice between two inconsistent remedies and it was not until then that he made an election as to which Act (*i.e.*, Missouri or Arkansas) he desired to govern his compensation payments" (R.59).

Respondent's failure to include a statement of this fact is consistent with his position throughout this litigation, which is that the doctrine of election of remedies has no place in the consideration of this case. Petitioners maintain that the omitted fact is decisive and controlling.

ARGUMENT

In this reply brief, petitioners have arranged their argument under headings which correspond to those in respondent's brief.

I

Carroll Did Not "Elect" to Come Within the Coverage of the Missouri Act

In petitioners' original brief (pp.20-24), the doctrine of election of remedies was fully considered. In his brief, respondent did not reply to petitioners' argument on this point, evidently for the reason that he does not consider that the doctrine is involved. Petitioners submit that the determination of this case depends upon the proper application of that doctrine, and that, when the doctrine is applied, this Court should conclude that Carroll never elected to claim compensation benefits under the Missouri Workmen's Compensation Act.

In the course of its opinion, the Court of Appeals said (216 F. 2d 815; R.146):

> "But the fact remains that Carroll, as a matter of Missouri law, 'elected' to come within the coverage of the Missouri law and to recover his compensation under that law".

On page 5 of his brief, respondent notes that, "when the word 'elected' was used in the opinion of the Court of Appeals, it was placed in quotations". The very fact that the Court of Appeals put that word "in quotations" shows that the Court was thereby applying the doctrine of election of remedies. Petitioners pointed out on pages 8-10 of their original brief that, in applying that doctrine by holding that Carroll had "elected" to have his rights de-

termined under the Missouri Act, the Court of Appeals overlooked the uncontradicted fact that, throughout the period he was receiving benefits under the Missouri Act, he was unaware of his rights under the Arkansas Act (See R.32-37).

In reversing the judgment of the District Court in the instant case, the Court of Appeals based its opinion largely upon *Magnolia Petroleum Company* v. *Hunt*, 320 U.S. 430, 88 L. Ed. 149, 64 S. Ct. 208 (See 216 F. 2d 808, 816; R.147). On pages 18 and 19 of the original brief, petitioners undertook to show that the *Hunt* case was not in point. Respondent now "concedes" that the case at bar "is not controlled" by the *Hunt* case (Br.6).

Respondent does contend, however, that the St. Paul-Mercury Indemnity Company, which had the workmen's compensation coverage on Hogan's employees, including Carroll (R.93), was duty-bound to object to the withdrawal of Carroll's claim from the Missouri Workmen's Compensation Commission and the lodgment of his claim with the Arkansas Workmen's Compensation Commission. Respondent argues that "it is doubtful that the Missouri Compensation Commission would have permitted a withdrawal from its jurisdiction if objection had been made" (Br.6). (On page 8 of their original brief, petitioners pointed out that Carroll never procured an award from the Missouri Commission and never even filed his claim with that Commission (R.98, 94, 35-37).) This amounts to a complaint on the part of respondent that Carroll should not be permitted to protect his rights. Petitioners are mindful of no principle which prohibits a litigant from taking a position consistent with the facts and permitted by law which will enhance his prospect of success.

Petitioners maintain that, from the time of his injury on January 26, 1953, Carroll had the right to claim and

obtain compensation benefits under the Arkansas Act and that the doctrine of election of remedies does not preclude him from asserting that right, as he did, promptly upon his discovery, on October 10, 1953, that he had such a right.

It is clear that, from the time of his injury, Carroll had the right to claim benefits under the Arkansas Act. In *Pacific Employers Insurance Company* v. *Industrial Accident Commission of California*, 306 U.S. 493, 83 L. Ed. 940, 59 S. Ct. 629, this Court, after observing that the full faith and credit clause of the Constitution of the United States cannot override the constitutional authority of a State to "legislate for the bodily safety and economic protection of employees injured within it", said (p.503):

> "*Few matters could be deemed more appropriately the concern of the State in which the injury occurs or more completely within its power*" (italics supplied).

We pass now to a consideration of respondent's argument that the decision in *Bradford Electric Light Company, Inc.* v. *Clapper, Admx.*, 286 U. S. 145, 76 L. Ed. 1026, 52 S. Ct. 571, 82 A. L. R. 696, reverses the well-settled doctrine of the *Pacific Employers Insurance Company* case.

II

The Decision in Bradford Electric Light Company Inc. v. *Clapper, Admx., Is Not Controlling*

Respondent's principal contention for an affirmance of the judgment of the Court of Appeals is based upon the decision in the *Clapper* case. In fact, it is hardly an overstatement to say that respondent's sole reliance is upon that opinion (Br.18).

Before discussing the *Clapper* case, is it important to call the Court's attention to the facts (1) that the em-

ployer-employee relationship did not exist between respondent, Lanza, and petitioner, Carroll, and (2) that the established public policy of Arkansas permits a common law action for negligence to be maintained in all cases except where that relationship exists and that, consequently, it would be obnoxious to that policy to hold otherwise.

In *Anderson* v. *Sanderson & Porter*, 146 F. 2d 58, 60, the United States Court of Appeals for the Eighth Circuit pointed out that the provision of the Missouri Act differs in controlling respects from the corresponding but different provision of the Arkansas Act upon the question whether an employee of a subcontractor who has secured workmen's compensation on his employees may maintain a common law action for damages against the prime contractor. In *Bunner* v. *Patti*, 343 Mo. 274, 121 SW 2d 153, and *New Amsterdam Casualty Company* v. *Boaz-Kiel Construction Company*, 8 Cir., 115 F. 2d 950, which cases were cited in the *Anderson* case, it was held that, under the Missouri Act, such a suit was not permitted. However, in the *Anderson* case, which involved the construction of the provision of the Arkansas Act, the Court of Appeals held firmly (in 1945) that such a suit could be maintained.

It was not until December 6, 1954, that the Supreme Court of Arkansas was called upon to determine the question. On that day, in *The Balduin Company* v. *Maner, Judge*, 273 SW 2d 28, that Court, following the doctrine of the Court of Appeals in the *Anderson* case, construed the Arkansas Act to permit an employee (*e. g.*, Carroll) of a subcontractor (*e. g.*, Hogan) carrying workmen's compensation insurance to maintain a common law action for damages against the prime contractor (*e. g.*, Lanza). In other words, the Supreme Court of Arkansas held, *mutatis mutandis*, that the employer-employee relationship did not exist between respondent, Lanza, and petitioner,

Carroll, in consequence of which there was nothing to prevent Carroll from maintaining a common law action for negligence against Lanza.

The rule, firmly embedded in the decisions of the Supreme Court of Arkansas, has been ever since the Arkansas Workmen's Compensation Act was adopted in 1940 that, "except in cases arising between employer and employee, no law shall be passed limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property". *Young, Admr.* v. *G. L. Tarlton, Contractor, Inc.* (1942), 204 Ark. 283, 288, 162 SW 2d 477, 479. In its unanimous opinion in *The Baldwin Company* case, the Supreme Court of Arkansas said (273 SW 2d 30):

> "Prior to 1938 section 32 of Article 5 of the constitution of Arkansas provided: 'No act of the General Assembly shall limit the amount to be recovered for injuries resulting in death, or for injuries to persons or porperty * * *.' By Amendment 26, adopted in 1938, the constitutional provision under consideration was amended to read as follows: 'The General Assembly shall have power to enact laws prescribing the amount of compensation to be paid by employers for injuries to or death of employees, and to whom said payment shall be made. It shall have power to provide the means, methods, and forum for adjudicating claims arising under said laws, and for securing payment of same. Provided, that otherwise no law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property * * * *.' *It is clear that Amendment 26 gives to the legislature the power to limit the amount of recovery only in cases where there is an employer-employee relationship*" (italics supplied).

The Court then quoted with approval the language above referred to from the opinion in the *Young* case.

Thus the Arkansas constitutional provisions and the cases construing them establish beyond any question that the public policy of Arkansas permits common law actions for damages to be maintained in all cases except where the employer-employee relationship exists. Respondent has always conceded that Hogan, not the defendant, Lanza, was Carroll's contractual employer. But respondent contended that Lanza was Carroll's statutory employer and that, consequently, Carroll was precluded by the Arkansas Workmen's Compensation Act from maintaining a common law action for damages against Lanza. Under identical circumstances, the same contention was made by the defendant (petitioner) in *The Baldwin Company* case and was rejected by the Supreme Court of Arkansas. 273 SW 2d 31.

It follows that the established policy of Arkansas permits a common law action for negligence to be maintained under a state of facts such as those which obtained in the case at bar.

Respondent says that it is "apparent that the facts in the *Clapper* case and facts in the instant case are essentially identical" (Br.8), and argues that "since the fact situation in the instant case is identical (with that in the *Clapper* case), it follows that the *Clapper* case must control" (Br.10). But the "fact situation" in the two cases is neither "identical" nor "essentially identical", as appears from respondent's own statement of the facts.

Respondent accurately says that the *Clapper* case "involved a Vermont resident employed in the State of Vermont by a Vermont employer, such employee having received injuries, resulting in his death, in the State of New Hampshire" and that a "common law action for negligence was filed *against the employer* in the State of New Hampshire" (Br.7) (italics supplied). Respondent also

correctly states that the case now before the Court "involves a resident of Missouri employed in Missouri by a Missouri employer" and that the employee was injured in the State of Arkansas and filed a common law action for damages in an Arkansas State Court *against one who is an employer under the Missouri law*" (Br.8) (italics supplied).

The difference in the factual situations is obvious at a glance. In the *Clapper* case, it was conceded on all sides that the *defendant was the employer of the plaintiff* (286 U. S. 150-151), while, as has already been shown, Lanza was neither the contractual employer nor the statutory employer of Carroll. Respondent was careful to say that the instant case was "*against one who is an employer under the Missouri law*". But the question is whether the action was against one who was Carroll's employer under the law of *Arkansas*, where the cause of action arose and where the suit was tried. Clearly, it was not such a suit. It follows that the controlling fact in the *Clapper* case is the opposite of the controlling fact in the instant case. Consequently, the *Clapper* case is not in point.

The Vermont statute provided that it should have extra-territorial effect, just as the Missouri statute, upon which respondent relies, provides that it shall have extra-territorial effect as to injuries received outside of Missouri if the contract of employment is made in Missouri. This Court held that New Hampshire was required to give full faith and credit to the Vermont statute and that *Clapper's* cause of action in New Hampshire was barred. But the Court based its decision largely upon the fact that there was "no adequate basis for the lower court's conclusion that to deny recovery would be obnoxious to the public policy of New Hampshire". 286 U. S. 161.

It has already been pointed out that the established public policy of Arkansas permits common law actions for negligence to be maintained in every case except where the employer-employee relationship exists, and that that relationship does *not* exist in the case now before the Court. This brings the instant case squarely within the rule announced in the *Pacific Employers Insurance Company* case, in which this Court held that "full faith and credit does not here enable one State to legislate for the other or to project its laws across State lines so as to preclude the other from prescribing for itself the legal consequences of acts within it". 306 U. S. 504. The Court there said (306 U. S. 504):

> "The Clapper case cannot be said to have decided more than that a state statute applicable to employer and employee within the state, which by its terms provides compensation for the employee if he is injured in the course of his employment while temporarily in another state, will be given full faith and credit in the latter *when not obnoxious to its policy.* See *Bradford Electric Light Co.* v. *Clapper, supra,* page 161, 52 S. Ct. page 576" (italics supplied).

While *Smith* v. *Arkansas Power & Light Company* (1935), 191 Ark. 389, 86 SW 2d 411, was decided before the Arkansas Workmen's Compensation Act was adopted in 1940, it shows how zealously the Supreme Court of Arkansas protects the right of the courts of that State to entertain tort suits based upon causes of action occurring within the boundaries of Arkansas. The Court there said (p.395):

> "It is true, of course, as appellant insists, that, as he was injured in this State, his right to recover compensation for those injuries and the amount therof must be determined by the laws of this State, uninfluenced by the compensation laws of the State in which plaintiff was employed" (citing cases).

The context shows that the expression, "his right to recover compensation", means his right to recover a judgment for damages, not workmen's compensation insurance. The *Smith* case is typical of a line of decisions in the Supreme Court of Arkansas, all of which hold that the public policy of that State is to maintain inviolate the common law right of action for damages in the courts of that State as to all causes of action arising in Arkansas except where the employer-employee relationship exists.

Respondent then falls back to this contention (Br.15):

> "Since the public policy of the State of Arkansas with regard to workmen's compensation was reversed by the constitutional amendment of 1938, decisions prior to 1938 are of no significance on the question of public policy of the State of Arkansas."

However, as has been pointed out, the Supreme Court of Arkansas, in the *Young* case and in *The Baldwin Company* case, both of which arose *after* the adoption of the Arkansas Workmen's Compensation Act, held that the public policy of Arkansas has been reversed by Amendment No. 26 *only* in cases where the employer-employee relationship exists.

It follows, therefore, that the established public policy of Arkansas is that a suit for common law negligence may be maintained in the courts of that State in every case except where the employer-employee relationship exists, and that, since the action now before the Court is not such a case, a decision that such a suit cannot be maintained would be obnoxious to the public policy of Arkansas.

III

The Result Reached by the Court of Appeals Is Not Sound and Is Not in Harmony With Other Decisions

The cases and the quotations from the Restatement, Conflict of Laws, cited under III of respondent's brief, are not relevant to the instant case for the reason that, as in the *Clapper* case, they involve the employer-employee relationship. That relationship does not exist in the case now before the Court.

CONCLUSION

Carroll never "elected" to come within the coverage of the Missouri Act for the reason that, during the time he was receiving compensation payments thereunder, he did not know he had rights under the Arkansas Act.

Moreover, the *Clapper* case is not in point for the reasons (1) that respondent, Lanza, was not the contractual employer or the statutory employer of petitioner, Carroll, and (2) that it is against the established public policy of Arkansas to prevent the maintenance of common law actions for negligence except in cases where the employer-employee relationship exists.

Accordingly, the judgment of the Court of Appeals should be reversed and the cause remanded, with directions to that Court to affirm the judgment of the District Court.

Respectfully submitted,

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March 29, 1955

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No. 375

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

VIRGIL G. CARROLL, HARRY B. HOGAN, Doing Business as HARRY B. HOGAN PAINTING COMPANY, and ST. PAUL-MERCURY INDEMNITY COMPANY ..... *Petitioners*

v.

M. LANZA, Doing Business as LAKE CHARLES ELECTRIC COMPANY ..... *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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v.

M. LANZA, Doing Business as LAKE CHARLES ELECTRIC COMPANY ..... *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court is reported at 116 F. Supp. 491 and appears on pages 40-69 of the printed record. The opinion of the United States Court of Appeals for the Eighth Circuit appears in the appendix to the petition (pp. I-XVI).

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

The question presented for review is whether, under the facts and circumstances of this particular case, the law of the State of Missouri which bars an action by the employee of a subcontractor against the general contractor should apply.

STATEMENT

Virgil G. Carroll, one of the petitioners, was injured on January 26, 1953, in an accident that occurred in Baxter County, Arkansas, during the construction of Bull Shoals Dam (R.94). Carroll was an employee of petitioner Harry B. Hogan, doing business as Harry B. Hogan Painting Company (R.92). Petitioner St. Paul-Mercury Indemnity Company was the workmen's compensation insurance carrier for Hogan (R.93). Hogan was a subcontractor on this job under respondent M. Lanza, doing business as Lake Charles Electric Company, who was the general contractor (R.92-93). Both Hogan (R.92) and Carroll (R.94) are residents of Springfield, Missouri, and Carroll was employed by Hogan in the State of Missouri (R.94). Lanza is a resident of the State of Louisiana (R.1,5).

On March 2, 1953, Carroll filed suit in the Circuit Court of Baxter County, Arkansas, against Lanza, alleging a common law action for damages as a result of the occurrence of January 26, 1953 (R.5-7). Harold J. Fisher of Springfield, Missouri, was attorney for Carroll on March 2, 1953 (R.7) and has continued as counsel for Car-

roll throughout this litigation. The action in Baxter County, Arkansas, was removed by Lanza to the United States District Court for the Western District of Arkansas (R. 1-2). Thereafter, Hogan and St. Paul intervened in the District Court action (R.25).

Trial to the Court without a jury (R.27) resulted in a judgment in favor of petitioners in the sum of Eighteen Thousand Dollars ($18,000.00) (R.70-71). Upon appeal to the United States Court of Appeals for the Eighth Circuit, this judgment was reversed (App. to Petition p. XVI). The Court of Appeals held that the cause of action was controlled by the law of the State of Missouri which bars a common law action by the employee of a subcontractor against a prime contractor where the Missouri Workmen's Compensation Act is applicable.

The facts pertinent to the question of whether or not the Missouri law is controlling are stated below.

Carroll, a resident of Missouri, employed in Missouri by Hogan, who was also a Missouri resident, received 34 weekly workmen's compensation payments under the Missouri Workmen's Compensation Act (R.103). These 34 payments were made through Harold J. Fisher, attorney for Carroll and also attorney for St. Paul. Carroll knew that he was receiving payments under the Missouri Workmen's Compensation Act (R.30). On October 10, 1953, Carroll requested of St. Paul that his workmen's compensation be paid under the Arkansas Workmen's Compensation Act (R.32-33). However, this request was not made until after the importance of the Missouri Workmen's Compensation payments had been called to the attention of counsel for Carroll by a request that they stipulate that Carroll's payments were being made under the Missouri Act (R.126-127). The maximum weekly compensation un-

der the Missouri law is $30.00, and the maximum weekly compensation under the Arkansas law is $25.00 (R.103).

It is well settled under Missouri law that an employee of an insured subcontractor may not maintain an action for common law negligence against a general contractor. *Bunner* v. *Patti*, 343 Mo. 274, 121 S.W. 2d 153, and *New Amsterdam Casualty Company* v. *Boaz-Kiel Construction Company*, 8 Cir., 115 F. 2d 950.

It has been held by the Circuit Court of Appeals for the Eighth Circuit that an employee of an insured subcontractor may sue the prime contractor at common law for negligence under the Arkansas Workmen's Compensation Law. *Anderson* v. *Sanderson & Porter*, 8 Cir., 146 F. 2d 58 (1945). However, this question has never been passed upon by the Arkansas Supreme Court, and there is, therefore, no controlling precedent on the Arkansas law on this point.

ARGUMENT

The question before the Court of Appeals was whether it should apply Missouri law or Arkansas law. The answer to that question depended upon the particular facts and circumstances of this particular case. The Court held that the rights of a Missouri resident employed in Missouri by a Missouri employer, who had for 34 weeks accepted compensation payments under the Missouri Workmen's Compensation Act through the attorney for the Workmen's Compensation Insurance carrier who was also his attorney, were controlled by Missouri law, although the accident itself occurred in the State of Arkansas.

It is, to say the very least, very doubtful that the decision of the Court of Appeals can be accurately described as being founded upon a theory of "election of remedies". The word "elected" in the opinion of the Court of Appeals is placed in quotations (Appendix to Petition p. XIV). It would appear that the Court of Appeals really held that the State of Missouri, in a proper exercise of its sovereign power, had provided that the acceptance of benefits under its workmen's compensation law should carry with it the acceptance of the provision that such benefits constituted an exclusive remedy; and that Carroll could not accept Missouri compensation payments for a period of 34 weeks and then contend that the bar of the Missouri statute had no application.

I

There Is No Conflict of Decision

The contention of petitioners that this decision is in conflict with decisions of other Courts of Appeals and with applicable state law is predicated upon an extremely tenuous base. All of the cases cited by petitioners deal only

with the general principles of law applicable to the question of "election of remedies". None of those cases involve a fact situation even remotely resembling that involved in the present case. Two of the Courts of Appeals decisions cited by petitioners held that an "election" had been made. *A. Klipstein & Company* v. *Grant*, 5 Cir., 141 F. 72, and *Minneapolis National Bank* v. *Liberty National Bank*, 10 Cir., 72 F. 2d 434. Both of the decisions of the United States Supreme Court cited by petitioners held that an election had been made. *Robb* v. *Vos*, 155 U.S. 13, 39 L. Ed. 52, 15 S. Ct. 4; and *United States* v. *Oregon Lumber Company*, 260 U.S. 290, 67 L. Ed. 261, 43 S. Ct. 100. The other three Court of Appeals cases cited by petitioners held that an election had not been made. *Pittsburgh Terminal Coal Corporation* v. *Bennett*, 3 Cir., 73 F. 2d 387; *Flannery Boat Company* v. *Greenslade*, 26 F. Supp. 502; aff. 108 F. 2d 531, cer. den. 309 U.S. 671, 84 L. Ed. 1017, 60 S. Ct. 615; and *Miles* v. *Lavender*, 9 Cir. 10 F. 2d 450. It would be equally as accurate to characterize the former four cases as being in conflict with the latter three as it is to contend that the present case is in conflict with all seven. However, it is obviously more accurate to state that none of the decisions are in conflict, for application of an identical principle of law to two entirely dissimilar fact situations can quite properly produce contrary results.

Certainly, the decision of the Court of Appeals does not announce an adherence to general principles concerning "election of remedies" which is contrary to that announced in the opinions cited by petitioners. Even if petitioners are correct in assuming that this case turns upon an "election", that would not justify the rather violent assumption that the Court was following erroneous, but unannounced, principles of law.

Not only is the present decision not in conflict with decisions of other courts, it is, in fact, in complete harmony with the decisions of other courts which have considered similar questions of law.

A similar question was presented in the case of *Ohlhaver* v. *Narron*, 4 Cir., 195 F. 2d 676 (1952). That action arose out of an automobile accident that occurred in North Carolina. The plaintiff was a passenger in an automobile operated by the defendant's decedent. Plaintiff and decedent were follow-employees of a New York employer, and the contract of employment had been entered into in the State of New York. Both were acting within the scope of their employment at the time of the accident. The plaintiff had been paid compensation under the Workmen's Compensation Act of New York, and that act precluded one, accepting benefits under the act, from bringing an action against a fellow-servant.

The Court held:

> "We think the district judge, having rightly found that plaintiff and Graham were fellow-servants, was further correct in holding that plaintiff, who received benefits under the Workmen's Compensation Act of New York was barred by that Act from bringing an action in a Federal Court in North Carolina against Graham, plaintiff's fellow-employee."

The Court said further:

> "Of the two states whose interests are here concerned (New York and North Carolina), we think New York is more intimately concerned; for it was there that the employer resides, the employment contract was there entered into, and it was from there that the activities of the plaintiff were directed. The employer has secured its workmen's compensation liability by procuring a policy of in-

> surance which contains an endorsement covering injuries sustained in any state. Since its interests are superior, the compensation act of New York is a bar to a common law action by an employee against a fellow-servant in any other jurisdiction."

Also directly in point is the case of *Jonathan Woodner Co.* v. *Mather*, D.C. Cir., 210 F. 2d 868 (1954). That action, like the present case, involved a suit by the employee of a subcontractor against the prime contractor. The plaintiff there was a resident of the District of Columbia and was employed in the District of Columbia. He was injured in Maryland. Under Maryland law an employee of a subcontractor cannot maintain a common law action for negligence against the prime contractor. Both the subcontractor and the prime contractor had workmen's compensation insurance, but the plaintiff did not claim workmen s compensation benefits under either the Maryland statute or the District of Columbia statute. Instead, he filed suit in the District of Columbia against the prime contractor for common law negligence. Upon appeal from a judgment in favor of the plaintiff, the Court of Appeals for the District of Columbia held:

> "* * * * in an employee-employer suit, if some Workmen's Compensation Act purports to bar the action, that bar will be applied in the forum."

The Court accordingly reversed the judgment in favor of plaintiff.

The identical question was involved in *Bradford Electric Company* v. *Clapper*, 1932, 286 U.S. 145, 52 S. Ct. 571, 76 L. Ed. 1026. That case is analyzed in *Jonathan Woodner Co.* v. *Mather, supra*, as follows:

> "Appellant says that under the full faith and credit clause we are bound to apply the law of Maryland. Much support for that contention is to be found in the decision of the Supreme Court in *Brad-*

ford Electric Company v. *Clapper*, 1932, 286 U.S. 145, 52 S. Ct. 571, 76 L. Ed. 1026. A negligence suit was there brought in New Hampshire by an employee against his employer, for an injury occurring in New Hampshire. The defense raised was that the contract of employment was made in Vermont, that the parties resided and did business there, and that under the laws of that state workmen's compensation was provided for the injury in question, and was made the sole remedy. Mr. Justice Brandeis, speaking for the Supreme Court, held that the full faith and credit clause required that the bar to suit raised by Vermont law be applied.

"During the intervening years the authority of the Bradford case has been attacked: Some commentators consider that it has been virtually overruled. But the impact of the later cases in the Supreme Court has been to expand the rights of interested states to provide workmen's compensation: the compensation system has thus been materially strengthened. It is now clear that the state of employment can give workmen's compensation, even though the injury occurred in another jurisdiction which would provide workmen's compensation on a basis said to be exclusive: *Alaska Packers Association* v. *Industrial Accident Commission*, 1935, 294 U.S. 532, 55 S. Ct. 518, 79 L. Ed. 1044. Clearly, too, the state in which the injury occurred can provide workmen's compensation, even though the state where the contract of employment was made would also provide workmen's compensation, on a purportedly exclusive basis: *Pacific Employers Insurance Company* v. *Industrial Accident Commission*, 1939, 306 U.S. 493, 59 S. Ct. 629, 83 L. Ed. 940. *But no decision of the Supreme Court has allowed a suit at common law to be maintained against the employer in a case where workmen's compensation was available to the employee by the law of a state having a substantial interest, and was declared to be the exclusive remedy by that law. In that situation,*

the reasoning of the Bradford case seems as valid today as it ever was" (italics supplied).

Jonathan Woodner Co. v. Mather, supra, also refers to Restatement, Conflict of Law, Section 401 (1948 Supp.) where it is said:

> "If a cause of action in tort or an action for wrongful death either against the employer or against a third person has been abolished by a workmen's compensation act of the place of wrong, no action can be maintained for such tort or wrongful death in any state.
>
> "* * * * *
>
> "b. *Effect of constitution of the United States.* If the compensation act of the state where the contract of employment is made abolishes the common law or statutory right of action either as a result of the fact that the employment was entered into in that state or by reason of the election of the parties to come within the operation of that act, no action can be maintained in any state irrespective of where the workmen was injured or killed unless the state where the wrong occurred has declared the act obnoxious to its policy of permitting recovery for the protection of the interests of persons living in the state. This result is required as between states of the United States under the full faith and credit clause of the constitution."

As has been previously stated, the Supreme Court of Arkansas has never passed upon the question of whether or not its own compensation law would bar the present action, therefore, it is impossible to contend that the State of Arkansas has announced that such a policy is obnoxious to it.

Petitioner has not called to the attention of this Court any decisions or statements of the law to the contrary.

II

The Court Correctly Interpreted the Import of the Case of Magnolia Petroleum Company v. Hunt

The case of *Magnolia Petroleum Company* v. *Hunt*, 320 U.S. 430, 64 S. Ct. 208, 88 L. Ed. 149, is referred to in the decision of the court below as follows (Appendix to Petition p. XV-XVI):

> "In the *Magnolia* case, Hunt, a resident of Louisiana, was employed in that state by Magnolia as a laborer in connection with the drilling of oil wells. In the course of his employment he went to Texas where, while working on an oil well, he was injured. He procured workmen's compensation for his injuries under the Texas Workmen's Compensation Law. Under the Texas law the award of compensation was final and exclusive, resembling the Missouri law in that respect. Afterward Hunt instituted a proceeding in Louisiana to recover compensation under the laws of that state. He was awarded the relief demanded by the State Court of Louisiana, and the Supreme Court reversed. It is difficult to distinguish that case from the present one. We are disposed, therefore, to apply what appears to us to be its authority here."

Petitioner contends that the *Magnolia Petroleum Company* case is not in point because Carroll never obtained an award of compensation from the Missouri Commission and never even filed his claim with that commission. The Court of Appeals, however, was undoubtedly aware that it is customary in Missouri, in uncontested compensation cases, for the Act to be implemented by the payment and receipt of compensation, without any requirement that there be a formal claim or formal award. Missouri law contemplates that the provisions of the act shall be carried out in that manner, and awards of compensation by the Missouri Commission occur only in contested cases.

Therefore, unless form is to be preferred over substance, the payment and acceptance of benefits under the Missouri Act has the same effect as a formal award under the Texas Act.

Actually, it is apparent that the Arkansas Workmen's Compensation Commission had no jurisdiction to accept a "transfer" of Carroll's compensation claim from Missouri. But, since the "opposing parties" before the Arkansas Workmen's Compensation Commission are the joint petitioners here, it is not surprising that the jurisdictional question has never been raised.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted

EDWARD L. WRIGHT
Counsel for Respondent

October 20, 1954

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SUPREME COURT OF THE UNITED STATES

October Term, 1954

VIRGIL G. CARROLL, HARRY B. HOGAN, DOING BUSINESS AS HARRY B. HOGAN PAINTING COMPANY, AND ST. PAUL-MERCURY INDEMNITY COMPANY ..... *Petitioners*

v. No. 375

M. LANZA, DOING BUSINESS AS LAKE CHARLES ELECTRIC COMPANY ..... *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT

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SUPREME COURT OF THE UNITED STATES

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v. No. 375

M. LANZA, DOING BUSINESS AS LAKE CHARLES ELECTRIC COMPANY ..... *Respondent*

BRIEF FOR RESPONDENT

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Constitution of the United States of America, Article 4, Section 1:

> "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

Pertinent sections of the workmen's Compensation Law of Missouri are set out in the appendix.

QUESTION PRESENTED

The question presented for review is whether, under the facts and circumstances of this particular case, the law of the State of Missouri which bars an action by the employee of a subcontractor against the general contractor should apply.

STATEMENT

Virgil G. Carroll, one of the petitioners, was injured on January 26, 1953, in an accident that occurred in Baxter County, Arkansas, during the construction of Bull Shoals Dam (R.5-6). Carroll was an employee of petitioner, Harry B. Hogan, doing business as Harry B. Hogan Painting Company (R.92). Petitioner, St. Paul-Mercury Indemnity Company, was the workmen's compensation insurance carrier for Hogan (R.93). Hogan was a subcontractor on this job under respondent, M. Lanza, doing business as Lake Charles Electric Company, who was the general contractor (R.92-93). Both Hogan (R.92) and Carroll (R.94) are residents of Springfield, Missouri, and Carroll was employed by Hogan in the State of Missouri (R.94). Lanza is a resident of the State of Louisiana (R.1, 5).

On March 2, 1953, Carroll filed suit in the Circuit Court of Baxter County, Arkansas, against Lanza, alleging a common law action for damages as a result of the occurrence of January 26, 1953 (R.5-7). Harold J. Fisher of Springfield, Missouri, was attorney for Carroll on March 2, 1953 (R.7) and has continued as counsel for Carroll throughout this litigation. The action in Baxter County, Arkansas, was removed by Lanza to the United States District Court for the Western District of Arkan-

sas (R.1-2). Thereafter, Hogan and St. Paul intervened in the district court action (R.25). Trial to the Court without a jury (R.27) resulted in a judgment in favor of the petitioners in the sum of Eighteen Thousand Dollars ($18,000.00) (R.70-71). Upon appeal to the United States Court of Appeals for the Eighth Circuit, this judgment was reversed (R.147). The Court of Appeals held that the cause of action was controlled by the law of the State of Missouri which bars a common law action by the employee of a subcontractor against a prime contractor where the Missouri Workmen's Compensation Act is applicable.

The facts pertinent to the question of whether the Missouri law is controlling are stated below.

Carroll, a resident of Missouri, employed in Missouri by Hogan, also a Missouri resident, received thirty-four weekly workmen's compensation payments under the Missouri Workmen's Compensation Act (R.103). These thirty-four payments were made through Harold J. Fisher, attorney for Carroll and also attorney for St. Paul. Carroll knew that he was receiving payments under the Missouri Workmen's Compensation Act (R.30). On October 10, 1953, Carroll requested of St. Paul that his workmen's compensation be paid under the Arkansas Workmen's Compensation Act (R.32-33). However, this request was not made until after the importance of the Missouri Workmen's Compensation payments had been called to the attention of counsel for Carroll by a request that they stipulate that Carroll's payments were being made under the Missouri Act (R.126-127). The maximum weekly compensation under the Missouri law is Thirty Dollars ($30.00) and under Arkansas law it is Twenty-five Dollars ($25.00) (R.103).

It is well settled under Missouri law that an employee of an insured subcontractor may not maintain an action of common law negligence against a general contractor. *Bunner* v. *Pattie*, 343 Mo. 274, 121 SW 2d 153, and *New Amsterdam Casualty Company* v. *Boaz-Kiel Construction Company*, 8 Cir., 115 F. 2d 950.

The Arkansas Workmen's Compensation law does not prohibit a common law action for negligence by an employee of an insured subcontractor against the prime contractor. *The Baldwin Company* v. *Maner, Judge*, (Ark.—December 6, 1954) 273 SW 2d 28.

ARGUMENT

The question before the Court of Appeals was whether it should apply Missouri law or Arkansas law. The answer to that question depended upon the facts and circumstances of this particular case. The Court held that the rights of a Missouri resident employed in Missouri by a Missouri employer, who had for thirty-four weeks accepted compensation payments under the Missouri Workmen's Compensation Act, through the attorney for the workmen's compensation insurance carrier who was also his attorney, were controlled by Missouri law, although the accident itself occurred in the State of Arkansas.

I

"Election of Remedies" Has No Application

The Court of Appeals did not invoke the doctrine of election of remedies in its decision. None of the principles of election of remedies was relied upon. When the word "elected" was used in the opinion of the Court of Appeals, it was placed in quotations (R.146).

It has been held that the denial of compensation by the Workmen's Compensation Commission of Arkansas did not constitute a bar to an award of compensation by the Workmen's Compensation Commission of Missouri. *Loudenslager* v. *Gorum*, 355 Mo. 181, 195 SW 2d 498. The doctrine of election of remedies was not applied in that case.

In *Magnolia Petroleum Company* v. *Hunt*, 320 U.S. 430, it was held that an award of compensation by the Texas Industrial Commission constituted a bar to a compensation claim in the State of Lousiana. However, this

result was reached not through the application of the doctrine of election of remedies but because of the "full faith and credit" clause of the Constitution of the United States.

Respondent concedes that this case is not controlled by *Magnolia Petroleum Company* v. *Hunt, supra,* but it does not follow that the payment and acceptance of thirty-four weeks of compensation under the Missouri Act is without significance. St. Paul-Mercury Indemnity Company routinely paid and Carroll accepted compensation payments under the Missouri Act. All of the petitioners initially conceded the interest of the State of Missouri in the matter. It is doubtful that the Missouri Compensation Commission would have permitted a withdrawal from its jurisdiction if objection had been made. See *Loudenslager* v. *Gorum*, 355 Mo. 181, 195 SW 2d 498. It is entirely probable that as a matter of comity the Arkansas Compensation Commission would not have accepted jurisdiction if an objection had been made. *Butler* v. *Lee Brothers Trucking Contractors*, 206 Ark. 884, 178 SW 2d 58; *Overcash* v. *Yellow Transit Company*, 352 Mo. 993, 180 SW 2d 678; and *Cole* v. *Industrial Commission*, 353 Ill. 415, 187 NE 520. However, no objection was made either before the Missouri Commission or the Arkansas Commission because the opposing parties on the compensation claim are joint petitioners here, and it is obvious that the change from Missouri compensation to Arkansas compensation was made for the sole purpose of seeking a recovery against respondent. Since petitioners concede that the judgment of the Court of Appeals would necessarily have been affirmed if Carroll had continued to receive benefits under the Missouri Act (regardless of whether or not an award was ever made by the Missouri Compensation Commission), it is difficult to comprehend the contention that the receipt of Missouri compensation for thirty-four weeks is without significance.

The real significance of the Missouri compensation payments is that both Carroll and St. Paul-Mercury Indemnity Company recognized that the interests of the State of Missouri were predominant and the interests of the State of Arkansas were casual.

II

The Decision in Bradford Electric Light Company, Inc. v. Clapper, Administratrix, Is Controlling

Although the decision of the Court of Appeals in entirely consistent with the spirit of *Magnolia Petroleum Company* v. *Hunt*, *supra*, it is not contended that the *Hunt* case is directly applicable. The *Hunt* case required the State of Louisiana to give full faith and credit to a compensation award of the State of Texas which had become final. It is conceded that there was no final award by the Missouri Compensation Commission in the present case.

However, it was held in *Bradford Electric Light Company, Inc.* v. *Clapper, Administratrix*, 286 U.S. 145, that the State of New Hampshire was required to give full faith and credit to a Vermont Statute which constituted a bar to the plaintiff's cause of action. The Clapper case is directly in point and controlling. That case involved a Vermont resident employed in the State of Vermont by a Vermont employer, such employee having received injuries, resulting in his death, in the State of New Hampshire. A common law action for negligence was filed against the employer in the State of New Hampshire and thereafter removed to the Federal District Court. The Vermont statute provided that the remedies of the Vermont Workmen's Compensation Act should be exclusive of all other remedies against the employer. The Vermont statute also provided that it should have extra-territorial effect. In an opinion by Mr. Justice Brandeis, this Court

While it would be inaccurate to say that the decision in *Pacific Employers Insurance Company* v. *Industrial Accident Commission, supra*, followed naturally from or was an outgrowth of the *Clapper* case, it is equally obvious that the two cases are not in irreconcilable conflict. In the *Clapper* case a remedy was being sought in the State of New Hampshire which was repugnant to the entire theory of the Vermont Workmen's Compensation Act. In the *Pacific Employers Insurance Company* case the remedy being sought in California was compatible with the Massachusetts remedy (although not identical), and no violence was done to the Massachusetts statute in holding that California might permit proceedings to secure a similar remedy provided by the laws of California.

Upon the combined authority of the *Alaska Packers Association* case and the *Pacific Employers Insurance Company* case it appears to be settled that either the State in which the employment was entered into or the State in which the injury occurred may award Workmen's Compensation under its own statute and by its own proceedings. It does not, however, follow therefrom that either State might allow a common law tort action which was barred by the statute of the other state and repugnant to the entire theory of workmen's compensation.

The conclusion is inescapable that decisions subsequent to the Clapper case have, at most, limited the application of the Clapper case to the fact situation there presented. Since the fact situation in the instant case is identical, it follows that the *Clapper* case must control.

It has been suggested that the *Clapper* case, although not overruled, has necessarily been limited in its scope by the decision in *Pacific Employers Insurance Company* v. *Industrial Accident Commission, supra*. There has been

advanced as a possible test of the applicability of the full faith and credit theory the "principle of balancing the governmental interest of the two competing states in the subject of the litigation". 134 ALR 1472. The annotater there says:

> "(1) If there exists in the state of the forum a statute or a public policy, and the governmental interests of that state in the persons, property, or events in the state involved in the litigation outweighs the governmental interest of the foreign state for whose statute recognition is sought, the refusal of the courts of the forum to give effect to the right under the foreign statute does not constitute a denial of full faith and credit to that statute.
>
> "(2) On the other hand, if the governmental interest of the state of the forum in the subject of the litigation is lacking or slight as compared with the governmental interest of the state for whose statute recognition is sought, the refusal of the courts of the forum to accord that recognition is a denial of full faith and credit."

In *Hughes* v. *Fetter*, 341 U.S. 609, 611, the test was stated as follows:

> "We have recognized, however, that full faith and credit does not automatically compel a forum state to subordinate its own statutory policy to a conflicting public act of another state; rather, it is for this court to choose in each case between the competing public policies involved."

Both on the basis of authority and sound reasoning it is clear that the governmental interests of the State of Missouri are superior to those of the State of Arkansas in the instant case. Petitioner Carroll was and is a resident of Missouri. He was employed in Missouri by a Missouri employer. He was injured in Arkansas while temporarily performing services there for his employer. An

held that New Hampshire was required to give full faith and credit to the Vermont statute and that the cause of action in New Hampshire was barred.

The present case involves a resident of Missouri employed in Missouri by a Missouri employer. The employee was injured in the State of Arkansas and filed a common law action for tort in an Arkansas State Court against one who is an employer under the Missouri law. The case was removed from the State Court to the Federal District Court. The Missouri statute provides that the remedies of the Missouri Compensation Act shall be exclusive of all other remedies available to the employee, and the Missouri statute specifically provides for extra-territorial effect in the following language:

> "This chapter shall apply to all injuries received in this State, regardless of where the contract of employment was made, and also to all injuries received outside of this State under contract of employment made in this State, unless the contract of employment in any case shall otherwise provide." Mo. R.S. 1949, section 287-110; Mo. R.S.A. Section 3700."

It is apparent that the facts in the *Clapper* case and facts in the instant case are essentially identical. The only difference between the two cases is that no workmen's compensation was ever sought or received in either Vermont or New Hampshire in the *Clapper* case, whereas in the instant case compensation was first paid and received under the Missouri law and later under the Arkansas law. Certainly, it cannot be contended that the receipt of thirty four weekly Missouri Compensation payments operates to lessen the effect of the Missouri law. In that regard, the argument in favor of application of the Missouri law is rendered even stronger. Nor can it be contended that the delayed "election" to seek compensation

payments under the Arkansas law is of significance. Obviously, if the employee cannot avoid the bar of the Missouri statute by a single proceeding in Arkansas, he cannot avoid it by a multiplicity of Arkansas proceedings.

A reversal of the Court of Appeals would require that *Bradford Electric Light Company, Inc.* v. *Clapper, Administratrix, supra*, be overruled.

Admittedly, there have been suggestions in lower court opinions and legal writings that *Bradford Electric Light Company, Inc.* v. *Clapper* is no longer valid precedent. However, this speculation finds no support in the decisions of this Court. The *Clapper* case is cited with approval in *Cardillo* v. *Liberty Mutual Insurance Company*, 330 U.S. 469. It is cited with no hint of disapproval in *Industrial Commission of Wisconsin* v. *McCartin*, 330 U.S. 622. As late as 1951, it was relied upon in the majority opinion in *Hughes* v. *Fetter*, 341 U.S. 609, and it was distinguished in the dissenting opinion in that case, but there was certainly no suggestion by the dissent that it was overruled.

What then has given rise to questions concerning the validity of the Clapper case? Generally, it appears to be based upon two subsequent opinions of this Court. *Alaska Packers Association* v. *Industrial Accident Commission of California*, 294 U.S. 532; and *Pacific Employers Insurance Company* v. *Industrial Accident Commission*, 306 U.S. 493. It is difficult to perceive any conflict between the *Clapper* case and the *Alaska Packers Association* case. Both cases held that it was proper to apply the compensation law of the State in which the contract of employment was made. The opinion in the *Alaska Packers Association* case cited the *Clapper* case several times with no hint of any question of its validity.

identical situation was involved in *Ohlhaver* v. *Narron*, 4 Cir., 195 F. 2d 676, 679, and it was there held:

> "Of the two states whose interests are here concerned (New York and North Carolina), we think New York is more intimately concerned; for it was there that the employer besides the employment contract was there entered into, and it was from there that the activities of the plaintiff were directed. The employer has secured its workmen's compensation liability by procuring a policy of insurance which contained an endorsement covering injuries sustained in any state. Since its interests are superior, the compensation act of New York is a bar to a common law action by an employee against a fellow servant in any other jurisdiction."

See also *Scott* v. *White Eagle Oil and Refining Company* (D.C. Kan., 47 F. 2d 615; and *Overcash* v. *Yellow Transit Company*, 352 Mo. 993, 180 SW 2d 678.

The extra-territorial application of the Missouri act cannot be questioned. *Sims* v. *Truscon Steel Company*, 343 Mo. 1216, 126 SW 2d 204; *Bolin* v. *Swift & Company*, 335 Mo. 732, 73 SW 2d 771, and *Daggett* v. *Kansas City Structural Steel Company*, 334 Mo. 207, 65 SW 2d 1036, cert. denied 292 U.S. 630. Also, it is well settled under the law of Missouri that the "election" of an employee to be a compensation employee rather than a common law employee becomes an integral part of a Missouri employment contract. *Hartman* v. *Union Electric Light & Power Company*, 331 Mo. 230, 53 SW 2d 241; and *Scott* v. *White Eagle Oil and Refining Company* (D. C. Kan.) 47 F. 2d 615. Obviously, the ultimate effect of contracts of employment made within its boundaries and between its citizens is of major importance to the State of Missouri. Also, the State of Missouri has a greater interest in the compensation of the petitioner for injuries received, since, if he should become a public charge, the burden of his support

would fall upon the State of Missouri, the state of his residence.

Another test to ascertain the limit of the application of the Clapper doctrine was suggested by the concurring opinion of Mr. Justice Stone (286 U.S. 163):

> "I agree that in the circumstances of the present case, the courts of New Hampshire, in giving effect to the public policy of that state, would be at liberty to apply the Vermont statute and thus, by comity, make it the applicable law of New Hampshire. In the absence of any controlling decision of the New Hampshire courts, I assume, as does the opinion of the court, that they would do so and that what they would do we should do. Hence, it seems unnecessary to decide whether that result could be compelled, against the will of New Hampshire, by the superior force of the full faith and credit clause."

This test has also been stated, somewhat differently, as requiring the forum to give full faith and credit to the statute of the foreign state unless to do so would violate well established public policy of the forum. Arkansas, like New Hampshire, has announced no controlling decision, and it is safe to assume that Arkansas would, by comity, make the statute of Missouri the applicable law of Arkansas under the circumstances. Certainly, there is no justification for asserting that the Missouri statute contravenes well established public policy of the State of Arkansas.

The Supreme Court of Arkansas has cited *Bradford Electric Light Company, Inc.* v. *Clapper, Administratrix, supra*, with approval. *Magnolia Petroleum Company* v. *Turner*, 188 Ark. 177, 65 SW 2d 1. It is true that the Arkansas Supreme Court decided in *The Baldwin Company* v. *Maner* (Ark. December 6, 1954) 273 SW 2d 28, that the

Arkansas Compensation Statute did not prohibit a common law action such as that alleged by petitioners. However, that decision is not based upon the public policy of the State of Arkansas, but rather upon the failure of the legislature to so provide. It is clear from the opinion of the Supreme Court of Arkansas that the legislature could so provide, and it is also indicated that in the opinion of the Court, rather than contravening public policy, such a provision would be desirable.

There are three decisions of the Supreme Court of Arkansas holding that the Louisiana Compensation Act could not bar a common law action in the State of Arkansas by a person injured in Arkansas. *Haynes Drilling Corp.* v. *Smith*, 200 Ark. 1098, 143 SW 2d 27; *Standard Pipeline Company* v. *Burnett*, 188 Ark. 491, 66 SW 2d 637, cert. denied 292 U.S. 649; and *Standard Oil Company of Louisiana* v. *Richerson*, 188 Ark. 382, 67 SW 2d 1003. However, the distinguishing features between these three cases and the instant case are numerous. In none of the three cases did it appear that the contract of employment was entered into outside the State of Arkansas. In all three cases the injured plaintiff was a citizen of Arkansas. The *Haynes Drilling Corp.* v. *Smith* decision indicates that the Louisiana Workmen's Compensation Act did not expressly provide for extra territorial effect. Furthermore, of particular significance with regard to the question of public policy, all three of these cases were decided at a time when the constitution of Arkansas, Article 5, Section 32 provided as follows:

> "No act of the General Assembly shall limit the amount to be recovered for injuries resulting in death, or for injuries to person or property; and in case of death from such injuries the right of action shall survive and the General Assembly shall

prescribe for whose benefit such action shall be prosecuted."

In other words, at the time of these decisions, the public policy of the State of Arkansas, as announced in its constitution, was opposed to the entire theory of workmen's compensation. Before the State of Arkansas could enact workmen's compensation legislation it was necessary to pass a constitutional amendment. This was done in 1938, and Amendment 26 to the Constitution of the State of Arkansas changed Article 5, Section 32 of the Arkansas Constitution to read as follows:

> "The General Assembly shall have power to enact laws prescribing the amount of compensation to be paid by employers for injuries to or death of employees, and to whom said payment shall be made. It shall have power to provide the means, methods, and forum for adjudicating claims arising under said laws, and for securing payment of same. Provided, that otherwise no law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property; and in case of death from such injuries the right of action shall survive, and the General Assembly shall prescribe for whose benefit such action shall be prosecuted."

Since the public policy of the State of Arkansas with regard to workmen's compensation was reversed by the constitutional amendment of 1938, decisions prior to 1938 are of no significance on the question of public policy of the State of Arkansas.

III

The Result Reached by the Court of Appeals Is Sound and Is in Harmony with Other Decisions

> "To allow the compensation system to be supplanted by suits for damages would be gravely to

> impair, if not to destroy, that system—a system which provides, in Justice Brandeis' words, 'not only for employees a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinate.' *Bradford Elec. Co.* v. *Clapper*, 286 U.S. at page 159, 52 S.Ct. at page 576." *Jonathan Woodner Company* v. *Mather* (D.C. Cir.—1954), 210 F. 2d 868, 872.

The question here involved has been examined exhaustively in the opinion in *Jonathan Woodner Company* v. *Mather, supra.* The following conclusion was reached by the Court (210 F. 2d 873):

> "But the thrust of these groups of cases, taken together, is apparent: In an employee-employer suit, if some workmen's compensation act purports to bar the action, that bar will be applied in the forum.
>
> The rationale underlying these cases, though not articulated, seems clear. The employer has incurred the burden of providing workmen's compensation insurance. The employee has forgone his right to sue the employer for negligence. But both have also gained. The employer had gained an immunity from common law suit. The employee has gained a right to relief even where his injury did not arise through the fault of his employer. The courts clearly consider that this system of mutual give and take would be upset if the employee could sue for negligence in another jurisdiction."

In Restatement, Conflict of Laws, Section 401 (1948 Supp.), the rule is stated as follows:

> "If a cause of action in tort or an action for wrongful death either against the employer or against a third person has been abolished by a workmen's compensation act of the place of wrong, no action can be maintained for such tort or wrongful death in any state.
>
> • • •

b. *Effect of Constitution of United States.* If the Compensation Act of the state where the contract of employment is made abolishes the common law or statutory right of action either as a result of the fact that the employment was entered into in that state or by reason of the election of the parties to come within the operation of that act, no action can be maintained in any state irrespective of where the workman was injured or killed unless the state where the wrong occurred has declared the act obnoxious to its policy of permitting recovery for the protection of the interests of persons living in the state. This result is required as between states of the United States under the full faith and credit clause of the constitution."

Petitioners have cited no case in which a contrary result was reached on a similar question of law. Yet the question has been before the courts on several occasions. *Jonathan Woodner Company* v. *Mather, supra; Willingham* v. *Eastern Airlines,* 2 Cir., 199 F. 2d 623; *Ohlhaver* v. *Narron,* 4 Cir., 195 F. 2d 676; *Scott* v. *White Eagle Oil and Refining Company* (D.C. Kan.), 47 F. 2d 615; and *Magnolia Petroleum Company* v. *Turner,* 188 Ark. 177, 65 SW 2d 1.

CONCLUSION

Respondent submits that the result reached by the Court of Appeals is supported by sound reasoning and authority and that it should be affirmed on authority of *Bradford Electric Light Company, Inc.* v. *Clapper, Administratrix*, 286 U.S. 145.

Respectfully submitted,

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March 16, 1955

APPENDIX

Mo. Rev. Stat. 1949, Section 287.060 (Rev. Stat. Ann. Section 3690):

> "1. Every employer and every employee, except as in this chapter otherwise provided, shall be conclusively presumed to have elected to accept the provisions of this chapter and respectively to furnish and accept compensation as herein provided, unless prior to the accident he shall have filed with the commission a written notice that he elects to reject this chapter."

Mo. Rev. Stat. 1949, Section 287.040 (Rev. Stat. Ann. Section 3698):

> "1. Any person who has work done under contract on or about his premises which is an operation of the usual business which he there carries on shall be deemed an employer and shall be liable under this chapter to such contractor, his subcontractors, and their employees, when injured or killed on or about the premises of the employer while doing work which is in the usual course of his business.
>
> "• • •
>
> "3. The provisions of this section shall not apply to the owner of premises on which improvements are being erected, demolished, altered or repaired by an independent contractor but such independent contractor shall be deemed to be the employer of the employees of his subcontractors and their subcontractors when employed on or about the premises where the principal contractor is doing work.
>
> "4. In all cases mentioned in the preceding subsections, the immediate contractor shall be liable as an employer to the employees of his subcontractors. • • •"

Mo. Rev. Stat. 1949, Section 287.110 (Mo. Rev. Stat. Ann. Section 3700):

> "1. This chapter shall apply to all cases within its provisions except those exclusively covered by any Federal law.
>
> "2. This chapter shall apply to all injuries received in this state, regardless of where the contract of employment was made, and also to all injuries received outside of this state under contract of employment made in this state, unless the contract of employment in any case shall otherwise provide."

Mo. Rev. Stat. 1949, Section 287.120 (Mo. Rev. Stat. Ann. Section 3691):

> "1. If both the employer and the employee have elected to accept the provisions of this chapter, the employer shall be liable irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injuries or death of the employee by accident arising out of or in the course of his employment, and shall be released from all other liability therefor whatsoever, whether to the employee or any other person.
>
> "2. The rights and remedies herein granted to an employee shall exclude all other rights and remedies of such employee, his wife, her husband, parents, personal representatives, dependents, heirs or next kin, at common law or otherwise, on account of such accidental injury or death, except such rights and remedies as are not provided for by this chapter. * * *."

Mo. Rev. Stat. 1949, Section 287.380 (Mo. Rev. Stat. Ann. Section 3722):

> "1. Every employer in this state, whether he has accepted or rejected the provisions of this

chapter, shall within ten days after knowledge of an accident resulting in personal injury to an employee, notify the commission thereof, and shall within one month, file with the commission under such rules and regulations and in such form and detail as the commission may require, a full and complete report of every injury or death to any employee for which the employer would be liable to furnish medical aid or compensation hereunder had he accepted this chapter, and every such employer shall also furnish the commission with such supplemental reports in regard thereto as the commission shall require.

"• • •

"3. No information obtained under the provisions of this section shall be disclosed to persons other than the parties to compensation proceedings and their attorneys, save by order of the commission, or at a hearing of compensation proceedings, but such information may be used by the commission for statistical purposes.

"4. Every person who violates any of the provisions of this section, or who knowingly makes a false report or statement in writing to the commission, shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than fifty nor more than five hundred dollars, or by imprisonment in the county jail for not less than one week nor more than one year, or by both such fine and imprisonment."

Mo. Rev. Stat. 1949, Section 287.400 (Mo. Rev. Stat. Ann. Section 3724 (Supp.):

"1. Upon receipt of notice of any accident for which compensation other than that provided in Section 287.140 (3701) shall be payable, the commission shall inform the employee general-

ly of his rights under this chapter. The employer shall notify the division as soon as payment of compensation is commenced and when terminated, and shall file with the commission, at the time of notice of termination, a physician's report. In the event a dispute arises between the employer and the employee regarding the payment of compensation, the commission shall assist the employee in filing a claim and securing an early adjudication thereof."

Mo. Rev. Stat. 1949, Section 287.450 (Mo. Rev. Stat. Ann. Section 3728):

"2. If the employer and the employee or his dependents do not agree in regard to compensation payable under this chapter, either party may make application for a hearing in regard to the matters at issue and for a ruling thereon. * * *."